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IN THE

Supreme Court of the United States

JOHN DOE, On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Government Deny a Person a Statutory Entitlement Based on Failure to Satisfy a Regulatory Requirement that the Government Itself Deliberately Refused to Fulfill?

2. When a Person is Prevented from Fulfilling a Regulatory Requirement Due to Deliberate Misrepresentations Specifically Approved by an Agency's Highest Officials and Other Governmental Misconduct, is the Agency Equitably Estopped from Relying on the Regulation to Withhold a Statutory Entitlement?

3. In the Alternative, Should this Court Summarily Reverse the Decision of the Federal Circuit Because, After Overruling Binding and Controlling Precedent, It Failed to Give Petitioners an Opportunity to Introduce New Claims and Evidence to Meet the New Legal Standard?

LIST OF PARTIES

Appellants in the Court of Appeals, Petitioners here, are representatives of a certified opt-in class of more than 9000 current and former attorneys employed by the United States Department of Justice. The party identified in the caption as John Doe is Daniel S. Jacobs. He is one of 186 class representatives, thirty of whom proceeded under pseudonyms. *See Doe v. United States*, 44 F. App'x 499 (Fed. Cir. 2002).

Appellee in the Court of Appeals, Respondent here, is the United States.

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Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000) 29

William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1 (1997) 24

Frederick S. Kuhlman, Comment, *Government Estoppel: The Search for Constitutional Limits*, 25 Loy. L.A. L. Rev. 229 (1992) 24

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Office of Federal Civilian Workforce Statistics, Office of Personnel Management, *The Fact Book* (2005 ed.), *available at* http://www.opm.gov/feddata/factbook/2005/factbook2005.pdf (last referenced Dec. 3, 2006) 15

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JOHN DOE, On Behalf of Himself and
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UNITED STATES,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered September 11, 2006.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 463 F.3d 1314 (Fed. Cir. 2006) (*Doe IV*), and is reproduced at A. 1a.[1] The opinion of the Court of Federal Claims is reported at 63 Fed. Cl. 798 (2005) (*Doe III*), and is reproduced at A. 25a.

[1] Citations to "A." are to the appendix hereto. Citations to "J.A.I" are to the Joint Appendix filed in the Court of Appeals during the interlocutory appeal (case no. 03-5075; *Doe II*), while citations to "J.A.II" are to the Joint Appendix filed in the Court of Appeals during the appeal from the final judgment of the Court of Federal Claims (case no. 05-5104; *Doe IV*).

The opinion from an earlier, interlocutory appeal in this case is reported at 372 F.3d 1347 (Fed. Cir. 2004) (*Doe II*), and is reproduced at A. 38a. The earlier opinion of the Court of Federal Claims is reported at 54 Fed. Cl. 404 (2002) (*Doe I*), and is reproduced at A. 67a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 2006. *See* A. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2000).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. §§ 5541(2)(c), 5542, and 5546(b); 28 U.S.C. §§ 1295(a), 1346(a)(2), and 1491; 31 U.S.C. §§ 1342 and 1350; and 5 C.F.R. § 550.111 are reproduced in Appendix E.

STATEMENT OF THE CASE

The Federal Employees Pay Act ("FEPA") guarantees all federal employees, including attorneys and other professionals, the right to overtime pay for work in excess of 8 hours per day or 40 hours per week. *See* 5 U.S.C. § 5542(a) (2000); *cf. id.* § 5541(2)(c) (listing exempt classes of employees).[2] Congress specifically enacted FEPA to provide overtime pay for white-collar government workers and put them on "par[] with those in other Federal services." 91 Cong. Rec. H5899 (daily ed. June 11, 1945) (statement of Rep. Ramspeck); *see also* 91 Cong. Rec. H6061 (daily ed. June 13, 1949) (statement of Rep. Angell).

As a matter of policy established and approved by its highest ranking officials, the United States Department of Justice

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[2] Unlike FEPA, the Fair Labor Standards Act exempts professional and administrative employees from its 40-hour workweek and overtime pay requirements. 29 U.S.C. § 213(a)(1) (2000).

("DOJ") required its nearly 12,000 attorneys to perform hundreds of thousands of hours of overtime work between 1992 and 1999. In one calendar year alone, attorneys in a ***single component*** of ***one*** DOJ office worked "the equivalent of 96 person years" in uncompensated overtime. J.A.I 00929. Notwithstanding its attorneys' clear statutory right to receive overtime pay, DOJ, as a matter of departmental policy, has refused to pay for the overtime it requires its attorneys to work.

Although DOJ concedes that § 5542(a) applies to its attorneys, J.A.II 0382, it has simply failed to comply with the law and instead developed a series of policies designed to nullify its attorneys' statutory entitlement to overtime pay. These policies sought to take advantage of an OPM regulation, 5 C.F.R. § 550.111(c) (2006), which states that authorization for overtime work must be documented in writing by authorized officials. DOJ's first strategy was simply to prohibit its officials from issuing specific written approval for overtime work that DOJ nevertheless required its attorneys to perform. Second, DOJ repeatedly issued official communications, approved by its top officers, falsely stating that its attorneys were not eligible to be paid for the hundreds of thousands of extra hours they spent working on nights, weekends, and federal holidays. Finally, DOJ restricted the authority to order or approve overtime to only a handful of top agency officials in Washington, D.C. Even that limited grant of authority proved illusory, however, because many of those authorized to approve overtime were unaware that they even had that power and testified uniformly that they would not have issued such authorization for overtime pay due to DOJ policy.

By insisting that employees have written authorization for each specific occasion of overtime work, while making it impossible to obtain any such writings, DOJ created a Catch-22 that nullified its attorneys' right to overtime pay under

§ 5542(a). DOJ relied on this lack of specific written approval as its basis for refusing to pay Petitioners—a class of thousands of DOJ attorneys and Assistant United States Attorneys—hundreds of millions of dollars in overtime and holiday pay to which they were statutorily entitled under 5 U.S.C. §§ 5542(a) and 5546(b).

DOJ's refusal to pay its attorneys for overtime work they were required to perform was flatly inconsistent with decades of case law interpreting § 5542(a). For half a century, the Court of Claims had held that an agency which requires its employees to work overtime, yet refuses to document each such demand in writing, could not rely on the absence of such written authorization under 5 C.F.R. § 550.111(c) as a basis for denying its employees the overtime pay they had earned. *See, e.g.*, *Anderson v. United States*, 136 Ct. Cl. 365 (1956) (per curiam). The trial court in this case, relying on that clear precedent, granted summary judgment on liability to Petitioners. *See Doe v. United States*, 54 Fed. Cl. 404 (2002) ("*Doe I*"). On interlocutory appeal, however, a panel of the Federal Circuit jettisoned that long-standing line of cases and held that DOJ could require its attorneys to perform overtime work, but avoid paying for it, simply by refusing as a matter of policy to issue specific written approvals. *See Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2002) ("*Doe II*"), *cert. denied*, 544 U.S. 904 (2005).

Compounding the injustice, in a later ruling, the Federal Circuit affirmed the Court of Federal Claims's refusal to allow Petitioners the opportunity to amend their Complaint to pursue alternate theories of relief, despite *Doe II*'s seismic shift in the legal landscape. *See Doe v. United States*, 463 F.3d 1314 (Fed. Cir. 2006) ("*Doe IV*"). The Federal Circuit also rejected Petitioners' renewed arguments for relief under § 5542(a). Petitioners had claimed that § 550.111(c) was invalid as applied to this case, and that DOJ should be equitably estopped from enforcing it here, due to DOJ's blanket policy

that any requests for overtime pay for attorneys be denied; its officially sanctioned, deliberate misrepresentations to its attorneys concerning their right to overtime pay; and its refusal to authorize enough officials even to review requests for such pay. The Federal Circuit rejected these arguments, creating a circuit split by flatly holding that this Court's precedents prevented Petitioners from attempting to equitably estop the Government from enforcing a generally valid regulation, even if Petitioners could establish that the Government engaged in affirmative misconduct. *Doe IV*, 463 F.3d at 1321–22.

This case is about far more than the 9000 DOJ attorneys who are owed over half a billion dollars in overtime pay. It is about the proper application and interpretation of the federal statute governing overtime compensation for ***all*** 2.7 million federal civilian employees, and whether the Government can manipulate its overtime approval process to compel those employees to work overtime without being paid. It is about whether the Government can coerce volunteer work in violation of the strict criminal prohibitions of the Antideficiency Act, 31 U.S.C. § 1342 (2000). Most importantly, it is about whether the highest ranking officials of DOJ—the agency charged with punishing violations of the Nation's laws—can deliberately make it impossible for its employees to fulfill a regulatory requirement, or intentionally lie to its employees to prevent or deter them from satisfying that requirement, and then rely on the DOJ officials' own misconduct as a basis for denying those employees their statutory rights.

The Federal Circuit's blessing of the Executive Branch's decision to ignore a federal statute cannot be reconciled with our system of separation of powers. This Court should grant certiorari.

I. THE GOVERNMENT'S AFFIRMATIVE MISCONDUCT

A. The Department of Justice and Its Top Officials Had Long Been Aware That DOJ Attorneys Were Entitled to Overtime Pay.

FEPA requires the Government to pay federal employees for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day." 5 U.S.C. § 5542(a). The Government has conceded that its attorneys and other professionals "plainly are" covered by FEPA. J.A.II 0382.

Indeed, for over twenty-five years, senior DOJ officials repeatedly have been cautioned that DOJ attorneys were entitled to overtime pay under § 5542(a), but were not being paid in accordance with the law. In 1980, for example, the Office of Legal Counsel ("OLC") recognized that attorneys "are entitled to overtime" under FEPA and that the Department's policy of refusing to compensate attorneys for overtime work was "inconsistent with the statutory mandate, and . . . not likely to protect the United States in litigation." A. 118a. A subsequent review in 1984 by the Deputy Director of the Office of Attorney Personnel Management concluded that this policy was "unwise at best, and unlawful at worst." J.A.II 0067. This memorandum recommended that DOJ clarify that its attorneys "are entitled to premium pay or compensatory time on the same basis as other DOJ employees." *Id.* at 0071; *see also* J.A.I 00432 ("[A]ttorneys employed by the Civil Division [are] entitled to overtime pay. . . .").

After another internal reexamination a decade later, Assistant Attorney General Walter Dellinger issued a policy for OLC stating, "When employees in the Department are required to work beyond their usual hours, they are entitled to overtime pay or compensatory time." A. 133a. DOJ never

extended that policy to attorneys outside of OLC. Attorney General Reno declined to bring the rest of the Department into compliance with FEPA, despite being warned by a DOJ Working Group studying this issue about "potential embarrassment to the Department as the chief enforcer of Federal law, including overtime statutes." A. 129a.

Several years later, Deputy Associate Attorney General Francis M. Allegra wrote in an internal memorandum, "[I]t is problematic (some might use the term unconscionable) for the Department to continue to not pay its attorneys overtime knowing full well that the overtime statute applies." A. 135a. DOJ ignored these warnings and continued to deny its attorneys overtime pay.

B. DOJ Required Its Attorneys to Work Overtime.

The Court of Federal Claims found that the Department of Justice officially required its attorneys regularly to work overtime:

> Attorneys are expected to work overtime and they do so on a regular basis. They are induced to work overtime by direct supervisors . . . . The overtime that they work is well known at the highest levels of the Justice Department. The Department recognizes that it could not function properly within its budget constraints without officially induced and approved overtime work by government attorneys.

Doe v. United States, 54 Fed. Cl. 404, 405 (2002) ("*Doe I*").

The record below amply supports these findings. The U.S. Attorney's Manual—described by the head of the Executive Office for U.S. Attorneys as "the gospel . . . that governs all the U.S. Attorney's Offices," J.A.I 00163–64—stated that "Assistant U.S. Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." A. 119a. A memorandum to the Attorney General

confirmed, "Attorneys are frequently expected to, and do, work more than 8 hours per day and/or 40 hours per week without extra compensation." A. 124a (emphasis in original). The Assistant Attorney General for Administration "testified that he did expect that attorneys would work overtime, and that he approved of that policy. He stated that any employee who thought that he or she was working overtime with DOJ approval would have been reasonable in making such an assumption." *Doe I*, 54 Fed. Cl. at 407.

That message was repeated in individual DOJ office manuals and policies throughout the nation. *See, e.g.*, J.A.II 0140 (Orientation Handbook for the District of Wyoming); J.A.II 0147 (Manual for the District of Montana). These overtime requirements also were reinforced by directives from United States Attorneys, who made clear that the intense demands on federal prosecutors and their heavy workloads required overtime work. *See* J.A.I 01349 ("[M]anagers have told attorneys that a substantial amount of unscheduled overtime duty is inherent to the job."); J.A.I 01336 (same).

The United States Attorney for the District of South Carolina, for example, issued a memorandum stating that "AUSAs who are working less tha[n] 48 hours per week, on an average, are viewed as underemployed by [DOJ]." J.A.I 00883. Similarly, the United States Attorney for the Northern District of Indiana circulated an e-mail stating, "[I]f you are not averaging at least 50 hours per week let me know. We have some cases for assignment." J.A.II 0144. Another United States Attorney stated, "Those of you that feel your docket is of a size that can be handled in a 40-hour work week please see the supervisor in your office for some additional assignments." J.A.I 00898; *see also* J.A.I 00889 (establishing a "goal" of "50 h[ou]rs" each week); J.A.I 00892 (average overtime must be "well over 40 hours a month"); J.A.I 00962 (lawyers cannot work "fewer than 45 hours each week"); J.A.I 00887 ("I expect each attorney to

report a minimum of approximately sixty-five hours of overtime per month.") (emphasis in original).

The Department's insistence that its attorneys work overtime was successful. An internal DOJ Working Group found that attorneys "commonly averag[ed] 5 to 9 extra hours per week." J.A.I 00941. The Group recognized that "failure to put in extra hours can jeopardize an attorney's chance for recognition, promotion, etc." *Id.* at 00933. Attorneys in some offices worked an average of 20 overtime hours each week. *Id.* at 00881. Average workweeks in late 1998 ranged from 45 to 52 hours. J.A.I. 01053–53c.

C. DOJ Refused to Pay Its Attorneys for Their Overtime Work and Falsely Informed Them That They Were Ineligible for Overtime Pay.

DOJ repeatedly told its attorneys that they could not obtain specific written authorization for overtime pay as a matter of DOJ policy. DOJ Order 1551.3(8)(a)(1), for example, stated that "[i]t is the general policy of the Department not to order overtime for attorney personnel." J.A.II. 00027. The U.S. Attorney's Manual explained that attorneys were expected to work overtime "without overtime pay." A. 121a. A memorandum to all United States Attorneys and Administrative Officers from the Executive Office for U.S. Attorneys likewise emphasized that "authorizing overtime . . . is contrary to the Department policy." A. 111a.

Official statements by DOJ's litigating divisions confirmed this policy. The Antitrust Division informed its employees, for example, that attorneys "[a]re required to put in substantial overtime and travel time without additional compensation." J.A.II 00150A. The Criminal Division likewise noted that its attorneys "frequently work long hours, beyond the 'normal' 40 hour workweek," but that time is "not recorded for overtime pay purposes." J.A.I 00924.

U.S. Attorneys' Offices further reiterated this policy and went so far as to tell attorneys, falsely, that they were not eligible to receive overtime pay. For instance, the District of South Carolina circulated a memorandum to its employees stating, "Attorneys are ineligible for paid overtime or compensatory time," but must "work the number of uncompensated hours in addition to the standard 40 hour workweek needed to successfully accomplish their work." J.A.I 00915. Of course, these policy statements did not relieve DOJ of its obligation to pay its attorneys for their overtime work; as the Court of Federal Claims emphasized, "agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime." *Doe I*, 54 Fed. Cl. at 417.

D. DOJ Made It Impossible to Receive Specific Authorization from an Authorized Official for Overtime Work.

To further prevent attorneys from fulfilling § 550.111(c)'s writing requirement, DOJ empowered only a handful of DOJ officials in Washington, D.C. to authorize each specific occasion of overtime work in writing, *see* J.A.II 0026 (DOJ Order 1551.3); J.A.I 00397 (DOJ Order 1200.1), including the Director of the Executive Office for U.S. Attorneys and the Assistant Attorneys General for Administration and the Environmental, Civil, and Civil Rights Divisions. *Doe I*, 54 Fed. Cl. at 414; *see also* J.A.I 00491, 00518–19. Even this limited grant of authority was of no utility because most of these officials were unaware they even had authority to authorize overtime. *Doe I*, 54 Fed. Cl. at 414; *see also* J.A.I 00491, J.A.II 00205–06. The Government expressly admitted that "[t]here were no further re-delegations" of this authority beyond this group of top officials in Washington. J.A.II 00348; *see also* J.A.I 00166.

Petitioners' expert witnesses testified without contradiction that this concentration of authority was "designed to establish a method whereby it was clearly impractical if not impossible to assume that authority for overtime could be obtained in sufficient time. . . . [T]he failure to delegate the authority to lower levels in the field is an intentional device by the Justice Department to avoid the payment of overtime to field attorneys." J.A.II 00225–26; *see also* J.A.II 00219. Thus, DOJ further ensured that its thousands of attorneys throughout the nation would be unable to obtain the specific written approval that DOJ claims is needed to be compensated for the overtime work that was expected and required of them.

E. DOJ Required Its Attorneys to Keep a False Set of Time Records.

DOJ also required its employees to keep two dramatically different sets of time records. "One record shows that all attorneys work eight hours per day, forty hours per week. The other set includes detailed records of the hours that they actually worked." *Doe I*, 54 Fed. Cl. at 415. The cooked set of books was used for pay purposes, *see, e.g.*, J.A.I 00966 (sample timesheet); the true records were "used for budgetary purposes and to assess attorneys' fees against opposing parties when statutes permit." *Doe I*, 54 Fed. Cl. at 407. Thus, the Department filed fee petitions with courts seeking reimbursement for overtime hours it refused to pay its attorneys for working, *see, e.g.*, J.A.I 01008 (motion filed by an AUSA seeking attorneys' fees for "542.75 regular hours and 179.75 overtime hours"), and submitted requests to Congress for additional funds based on the number of uncompensated overtime hours its attorneys worked, *see* J.A.II 0239–40; J.A.I 01356–57.

II. THE RULINGS BELOW.

A. In *Doe II*, the Federal Circuit Overruled Half a Century of Precedent and Denied Petitioners' Overtime Claims Due to Failure to Satisfy § 550.111(c)'s Writing Requirement.

The Court of Federal Claims granted summary judgment for Petitioners, ruling that they were entitled to overtime pay under 5 U.S.C. § 5542(a). *Doe I*, 54 Fed. Cl. at 418. Relying on a massive record establishing that authorized officials wanted and needed attorney personnel to work overtime and required them to do so, the trial court concluded that DOJ "has 'ordered or approved' overtime for members of the Class, for purposes of [§ 5542(a)]," *id.* at 405, entitling them to overtime compensation. This ruling rested on an unbroken line of cases dating back several decades which held that § 5542(a) would be eviscerated if an agency could require employees to work overtime without pay by refusing to issue specific written authorization for that work. *See, e.g.*, *Byrnes v. United States*, 163 Ct. Cl. 167, 174 (1964) ("The invocation of departmental regulations requiring specific written authority for overtime cannot avoid the plain requirements of the statute for overtime pay when the performance of this overtime is induced by the Government . . . .").

Overruling fifty years of precedent, the Federal Circuit reversed the grant of summary judgment to Petitioners and, without allowing Petitioners to meet the new legal standard, directed that summary judgment be granted for the Government. *Doe II*, 372 F.3d at 1354–57. It held that two opinions of this Court having nothing to do with § 5542(a), *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *OPM v. Richmond*, 496 U.S. 414 (1990), *sub silentio* overruled the cases upon which Petitioners and the Court of Federal Claims had relied. *Id.* It explained that these precedents gave insufficient weight to 5 C.F.R. § 550.111(c), an OPM regulation stating that overtime work "may be ordered or approved only in writing by an

officer or employee to whom this authority has been specifically delegated." The Federal Circuit concluded that, because DOJ had refused to issue specific written approval for the overtime work it required Petitioners to perform, they were not entitled to overtime pay. *Doe II*, 372 F.3d at 1363. This Court denied certiorari of that interlocutory ruling. 544 U.S. 904 (2005).

B. In *Doe IV*, the Federal Circuit Held That DOJ's Affirmative Misconduct Does Not Prevent It from Enforcing § 550.111(c)'s Writing Requirement and That, Despite *Doe II*'s Dramatic Change in the Law, Petitioners Could Not Pursue New Claims.

Following the Federal Circuit's ruling in *Doe II*, the Court of Federal Claims immediately rendered summary judgment in DOJ's favor on all Petitioners' claims. J.A.II 00297. Petitioners moved the court to reconsider its entry of final judgment, arguing that, given the Federal Circuit's dramatic shift in the case law, they had the right to raise additional arguments and pursue alternate theories for recovery that were "not needed under the existing state of the law" prior to *Doe II*. J.A.II 00544–45. Petitioners also argued that their § 5542(a) claim was still viable because § 550.111(c)'s writing requirement was invalid as applied to the circumstances of this case and, in any event, the Government was equitably estopped from enforcing it, due to: (i) DOJ's order that its officials not issue specific written approval for overtime work; (ii) DOJ's refusal to appoint enough authorized officials to approve overtime work in advance; and (iii) DOJ's blatant and repeated misrepresentations to its attorneys concerning their eligibility for overtime pay.[3] *Id.*

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[3] In their first round of briefing to the Federal Circuit in *Doe II*, Petitioners repeatedly emphasized that they were not at that time raising equitable estoppel arguments, because they were unnecessary in light of the then-established principle that an employee is entitled to pay for any work

The Court of Federal Claims rejected Petitioners' as-applied challenge and refused to allow Petitioners to present their equitable estoppel arguments or make new claims. *See Doe v. United States*, 63 Fed. Cl. 798, 804 (2005) (*Doe III*). The Federal Circuit affirmed the lower court's decision. *Doe IV*, 463 F.3d at 1327. It held that this Court's rulings in *Schweiker*, 450 U.S. 785, and *Richmond*, 496 U.S. 414, categorically barred Petitioners from attempting to equitably estop the Government from enforcing § 550.111(c)'s writing requirement, regardless of the scope of the Government's alleged misconduct. The Federal Circuit concluded that "***any*** equity-based attack to the reasonableness of the writing requirement must fail." *Id.* at 1321 (emphasis added). It also held that Petitioners were not entitled to raise new claims because, although *Doe II* overruled numerous previously binding cases, it did not actually "set forth a new legal standard." *Id.*

ARGUMENT

I. THE FEDERAL CIRCUIT HAS EFFECTIVELY REPEALED THE STATUTORY RIGHT TO OVERTIME PAY OF ALL FEDERAL EMPLOYEES.

In *Doe IV*, the Federal Circuit upheld DOJ's deliberate, intentional decision effectively to repeal Petitioners' statutory right to overtime pay under 5 U.S.C. § 5542(a) through its unreasonable and illegal application of 5 C.F.R. § 550.111(c). This ruling has government-wide significance because § 5542(a) applies to almost every federal employee in nearly every civilian agency. Absent review by this Court, the Federal Circuit's ruling will be binding throughout the nation, and § 5542(a)'s statutory command will be reduced to a mere suggestion.

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his agency compels or encourages him to perform, regardless of whether he is given specific written authorization. *See* J.A.II 00464–67.

A. Because the Federal Circuit is the Only Court of Appeals with Jurisdiction Over FEPA Claims, Its Ruling Affects Virtually Every Federal Employee.

Although this case involves a significant amount of money—over $500 million in overtime and holiday pay, *see* J.A.II 00250—the issues it raises are of even greater magnitude. This case directly affects not only the 9000 Petitioners whose claims the Federal Circuit rejected, but all 2,713,200 federal civilian employees, almost all of whom are covered by FEPA.[4] It has particular significance for the 1,061,019 professional and administrative federal employees[5] who, like Petitioners, are exempt from the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), and must rely exclusively on 5 U.S.C. § 5542(a) for their right to overtime pay. The Government itself argued below that the importance of this issue "cannot be exaggerated" because § 5542 "applies to the entire Federal Government." Pet. of the U.S. for Permission to Take an Interlocutory Appeal at 8. This case represents this Court's only real opportunity to correct the Federal Circuit's misinterpretation of FEPA and, more generally, to prevent wholesale Executive Branch nullification of § 5542(a).

There will never be a circuit split concerning the proper interpretation and implementation of § 5542(a) because the Federal Circuit is the only court in the nation with jurisdiction to review appeals in federal overtime pay cases, *see* 28 U.S.C. §§ 1295(a)(2), (a)(3), whether the case originates in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (2000), or local district courts under the Little Tucker Act, 28

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[4] *See* Office of Federal Civilian Workforce Statistics, Office of Personnel Management, *The Fact Book* 7 (2005 ed.), *available at* http://www.opm.gov/feddata/factbook/2005/factbook2005.pdf (last visited Dec. 3, 2006).

[5] *Id.* at 45.

U.S.C. § 1346(a)(2) (2000). In recognition of the Federal Circuit's unique role in the federal judicial system and its exclusive jurisdiction over certain substantive areas, this Court repeatedly has granted certiorari in important cases from the Federal Circuit even in the absence of a circuit split. *See, e.g., Teleflex, Inc. v. KSR Int'l Co.*, 119 F. App'x 282 (Fed. Cir. 2005), *cert granted sub nom. KSR Int'l Co. v. Teleflex, Inc.*, 126 S. Ct. 2965 (2006); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001) (federal personnel law); *United States v. Hatter*, 532 U.S. 557 (2001) (judicial pay claims); *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (money claims against the government). Here, review is necessary to protect the statutory right to overtime pay of over 2.7 million federal civilian employees and to reaffirm that the Executive Branch cannot unilaterally nullify statutory rights by making it impossible to satisfy regulatory requirements.

This case is an ideal vehicle for reviewing the Federal Circuit's rulings because of the breadth and depth of the record. Claims for overtime pay frequently are pursued by individuals or small groups of co-workers for small amounts of money and rarely justify the time and expense of bringing an appeal to the Supreme Court. *See, e.g., Amos v. United States*, 13 Cl. Ct. 442, 452 (1987) (rejecting liquidated damages claims by eleven correctional institution cook foremen for being required to work during lunch breaks). Such relatively small claims, however, have significant value to those employees, whom Congress has protected by enacting § 5542(a). This Court should grant certiorari to ensure that FEPA is interpreted and applied properly throughout the federal government.

B. DOJ'S Refusal to Issue Written Authorizations for Required Overtime Work in Accordance with 5 C.F.R. § 550.111(c) Effectively Repealed Its Attorneys' Statutory Right to Overtime Pay Under 5 U.S.C. § 5542(a), Rendering the Regulation Invalid as Applied.

The Federal Circuit's ruling jeopardizes the overtime rights of all federal employees because, contrary to this Court's precedents, it allows the Executive Branch to use an administrative regulation to circumvent a federal law and effectively repeal a statutory right. Most cases addressing a regulation's validity assess whether the text of the regulation itself contradicts or unreasonably interprets a federal law. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Separation of powers, however, also bars an agency from nullifying a statutory right or otherwise frustrating the clear congressional intent behind a statute by unreasonably implementing or administering a facially valid and otherwise unremarkable regulation. *See INS v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (distinguishing between regulation which "is facially invalid because it is without statutory authority" and regulation which "may be invalid as applied in [certain] cases"); *see, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991). As this Court explained in *United States v. Haggar Apparel Co.*,

> The analysis of a regulation's application in any particular case, of course, may disclose an imprecise or imperfect implementation of the statute. . . . ***In the process of considering a regulation in relation to specific factual situations***, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it. ***In those instances, the regulation will not control.***

526 U.S. 380, 392 (1999) (emphasis added). Put simply, an agency cannot nullify a federal statute by promulgating a

seemingly innocuous regulatory requirement that in practice undermines the underlying statutory entitlement; in such a case, the regulation is invalid as applied. *See Chevron*, 467 U.S. at 843 (noting that federal agencies "must give effect to the unambiguously expressed intent of Congress").

In this case, 5 U.S.C. § 5542(a) provides that "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day . . . performed by an employee are overtime work and shall be paid for." 5 C.F.R. § 550.111(c) elaborates that "[o]vertime work . . . may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." Unlike other writing requirements that require ***an applicant*** to submit a written request for benefits, *see, e.g.*, 20 C.F.R. § 404.611(a) (2006) (Social Security applications must be in writing on a particular form), § 550.111(c) establishes a written authorization requirement that ***only the agency can satisfy***. DOJ nevertheless ordered its officials, as a matter of policy, to deny attorneys the specific written approval they needed under § 550.111(c) to be compensated for the extra work they were required to perform. *See* J.A.II 0027, DOJ Order 1551.3 (Nov. 15, 1971) ("It is the general policy of the Department not to order overtime for attorney personnel."). It did so, OLC concluded, "as a device to escape the payment of premium pay." A. 115a.

In *Doe II*, the Federal Circuit found that § 550.111(c)'s writing requirement was a reasonable interpretation of § 5542(a) under *Chevron*. 372 F.3d at 1362. This Court declined to review that ruling. 544 U.S. 904 (2005). In *Doe IV*, however, the Federal Circuit went on to conclude that § 550.111(c) also was valid and enforceable as applied to the particular factual circumstances of this case. 463 F.3d at 1320–22. Whether or not § 550.111(c)'s writing requirement is facially valid, allowing DOJ to establish a policy of

refusing to issue specific written authorization for required overtime work, and then using the absence of such written approval as a basis for denying its attorneys overtime pay, squarely contradicts Congress's clear intent as embodied in § 5542(a). *See INS v. Cardoza-Fonesca*, 480 U.S. 421, 447–48 (1987) (noting that courts "must reject administrative constructions which are contrary to clear congressional intent"); *BATF v. FLRA*, 464 U.S. 89, 97 (1983).

Allowing the Federal Circuit's ruling to stand would permit the Executive Branch effectively to repeal statutes at will by promulgating regulatory requirements and then making it impossible to satisfy them. It would be the equivalent of refusing to provide application forms to citizens seeking Social Security and then denying them benefits under 20 C.F.R. § 404.611(a) based on their failure to submit the proper form. *Cf. Schweiker*, 450 U.S. at 790 (noting that a "regulation requiring that applications be in writing" on a particular form is facially valid). An agency cannot abdicate its responsibilities in this way and then invoke its own failure as a justification for denying a person a statutory right.

DOJ's application of § 550.111(c), if left undisturbed, also would mean that the Attorney General, DOJ's top officials, and supervisors throughout the nation have intentionally and systematically violated the Antideficiency Act. This Court should not permit an agency to administer or implement a regulation so as to cause its top officials to violate a federal statute, particularly a criminal law. The Antideficiency Act states, "An officer or employee of the United States Government . . . ***may not accept voluntary services*** for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342 (2000) (emphasis added). The statute provides that "[a]n officer or employee of the United States Government . . . knowingly and willfully violating section . . . 1342 . . . shall

be fined not more than $5,000, imprisoned for not more than 2 years, or both." *Id.* § 1350.

Under the Act, employees are barred from waiving parts of their congressionally mandated minimum salary. *See In re Employment Status of "Volunteers" Connected With Federal Advisory Comms.*, 6 Op. Off. Legal Counsel 160, 162 (1982); *see especially In re: Nat'l Mediation Bd. Obligation of Amounts for Compensation and Expenses*, No. B-217475, 1986 U.S. Comp. Gen. LEXIS 11, at *1 (Dec. 24, 1986). The Government's argument in the lower courts, that Petitioners are not entitled to compensation because they performed the work at issue "voluntarily," *see* J.A.II 0398; *see also* J.A.II 0351, 0375; Def.'s Mot. For Summ. J. at 7, confirms that DOJ's application of § 550.111(c) in the circumstances of this case violated the Antideficiency Act, contravened Congress's clearly expressed intent, and cannot be permitted to stand. Given the Federal Circuit's exclusive jurisdiction over FEPA appeals, this Court is the only body that can correct this error and safeguard the rights of federal employees throughout the nation.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER WHETHER THERE ARE ANY CIRCUMSTANCES UNDER WHICH THE GOVERNMENT MAY BE EQUITABLY ESTOPPED FROM DENYING A PERSON A STATUTORY ENTITLEMENT.

This Court has stated, "[W]hen the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Heckler v. Cmty. Health Servs.*, 467 U.S 51, 60 n.12 (1984) (citations omitted). It continually has emphasized that affirmative misconduct may be sufficient to justify the use of equitable estoppel against the Government. *See, e.g., Richmond*, 496 U.S. at 423 ("We leave for another day whether an estoppel claim could ever succeed against the Government.");

INS v. Miranda, 459 U.S. 14, 19 (1982) (per curiam).[6] Most circuits "will not allow the government to deal dishonorably or capriciously with its citizens," or to "play an ignoble part or do a shabby thing." *Massaglia v. Comm'r*, 286 F.2d 258, 262 (10th Cir. 1961) (citation omitted). The Federal Circuit, in contrast, has held that the Government can use an administrative regulation to deny people their statutory entitlements, regardless of how deliberately dishonest the Government behaved concerning those entitlements, or whether the Government intentionally made it impossible to satisfy the regulation. *See Doe II*, 372 F.3d at 1357; *Doe IV*, 372 F.3d at 1321. This Court should grant certiorari to resolve the split.

A. The Federal Circuit's Ruling Highlights a Split Among Circuits as to Whether Affirmative Misrepresentations or Misconduct Can Give Rise to Estoppel Against the Government.

Though the Federal Circuit's approach to equitable estoppel of the Government has not been entirely consistent, its *per se* declarations in *Doe II*, 372 F.3d at 1356, that "'equitable' considerations . . . could not impose liability on the government," and in *Doe IV*, 372 F.3d at 1321, that "any equity-based attack to the reasonableness [of a regulation] . . . must fail," have been echoed in numerous other recent opinions of that court. For example, the Federal Circuit flatly has held that "actions of regulatory authorities cannot . . . create an estoppel against the government," *Computervision Corp. v. United States*, 445 F.3d 1355, 1368 (Fed. Cir. 2006), and that "misinformation supplied by the agency cannot estop the government from enforcement of the law as it is written." *Archibald v. Dep't of the Air Force*, 184 F. App'x 959, 961 (Fed. Cir. 2006). It elsewhere has declared that a "party cannot claim estoppel against the government based on the ac-

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[6] *See also Schweiker*, 450 U.S. at 788; *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314–15 (1961).

tions of an agency employee." *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1360 (Fed. Cir. 2000); *see also Villaflor v. OPM*, 114 F. App'x 389, 390 (Fed. Cir. 2004) (affirming an agency ruling that it could not be "estopped from applying statutory or regulatory requirements due to agency error"). The facts of this case demonstrate that, even if an entire federal agency engages in open, deliberate misrepresentations and extreme misconduct, the Federal Circuit will not entertain an equitable estoppel against the federal government as a matter of law. *See Doe II*, 372 F.3d at 1356; *Doe IV*, 372 F.3d at 1321.[7]

A few circuits have expressed strong doubts as to whether estoppel against the Government ever is possible. *See, e.g., Savoury v. U.S. Att'y Gen.*, 449 F.3d 1307, 1318 (11th Cir. 2006) ("[I]t is far from clear that the doctrine of equitable estoppel may even be applied against a government agency."); *Volvo Trucks of N. Am., Inc. v. United States*, 367 F.3d 204, 211 (4th Cir. 2004) (noting that government estoppel may be "outright disallowed"). The majority of circuits, however, consistently has held—even after *Schweiker* and *Richmond*—that the Government ***can be*** estopped by the acts of its employees when the traditional elements of estoppel are satisfied and the agency or employee has engaged in misconduct. As the Seventh Circuit, for example, has stated, "To establish equitable estoppel, the party claiming estoppel must show:

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[7] In earlier cases, the Federal Circuit had recognized that the Government is subject to equitable estoppel in the limited context of public contract cases. *See Burnside-Ott Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993) (holding that, because the plaintiff's equitable estoppel claim is "based upon its contract with the Navy," it "is not barred as a matter of law because of *Richmond*"). Elsewhere, the Federal Circuit has held that, "if *equitable estoppel is available at all* against the government[,] some form of affirmative misconduct must be shown." *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (emphasis added). The *Doe IV* court concluded that equitable estoppel of the Government was not, in fact, available.

(1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment. When asserting equitable estoppel against the government, one must also prove affirmative misconduct." *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002) (citations omitted); *accord Castillo v. Ridge*, 445 F.3d 1057, 1061 (8th Cir. 2006); *Mich. Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004); *Hoover v. West*, 93 F. App'x 177, 182 (10th Cir. 2004); *Mauting v. INS*, 16 F. App'x 788, 790–91 (9th Cir. 2001); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *Monongahela Valley Hosp., Inc. v. Sullivan*, 945 F.2d 576, 589 (3d Cir. 1991).

The Ninth Circuit has upheld estoppel claims against the Government based on dishonesty similar to that at issue here. For example, in *Winter v. United States*, 93 F. App'x 145 (9th Cir. 2004), the plaintiff sought compensation from the Government for alleged medical malpractice. The Government, citing 28 U.S.C. § 2401(b)'s limitations period, argued that he was statutorily barred from obtaining any such funds. The Ninth Circuit rejected this argument, holding that the Government was equitably estopped from relying on § 2401(b) as a basis for denying him payment because "the VA engaged in a pervasive pattern of affirmative misconduct" throughout the limitations period. *Id.* at 146. The court later reiterated that equitable estoppel was justified by the "pervasive pattern of affirmative misrepresentation and concealment that was deliberately perpetrated by government attorneys." *Id.* at 147. The Federal Circuit's rulings in the cases below cannot be reconciled with this holding, or the equitable estoppel caselaw of the majority of other circuits.

Numerous commentators have recognized this circuit split and the unsettled state of the law on this issue. *See, e.g.*, Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 707 (1991) (noting that law concerning estoppel of the

Government is "highly incoherent" and "unintelligible to the lower courts"); *The Supreme Court—Leading Cases: Equitable Estoppel Against the Government*, 104 Harv. L. Rev. 286, 290 n.37 (1990) (discussing the "morass of conflicting approaches to governmental estoppel in the circuits"); *see also* William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1, 30 (1997); Frederick S. Kuhlman, Comment, *Government Estoppel: The Search for Constitutional Limits*, 25 Loy. L.A. L. Rev. 229, 232 (1992). This Court should definitively settle the issue and hold that affirmative misconduct can give rise to equitable estoppel of the Government. The question has percolated through the lower courts for decades; in this case, it cries out for an answer.

B. The Federal Circuit's Conclusion That the Government Cannot Be Equitably Estopped, Regardless of the Severity of its Dishonesty or Misconduct, is Incorrect.

The Federal Circuit's refusal to estop the Government was unjustified, particularly given the circumstances of this case. Courts naturally are reluctant to subject the Government to estoppel based on innocent or negligent misrepresentations, particularly oral statements. *See Rapp v. U.S. Dep't of Treasury*, 52 F.3d 1510, 1516–17 (10th Cir. 1995); *Allstate Ins. Co. v. Adana Mortgage Bankers, Inc.*, 725 F.2d 1324, 1326 (11th Cir. 1984). They also are disinclined to equitably estop the Government based on the acts of one or a few of the Government's tens of thousands of low-level, front-line employees scattered throughout the nation. *See Fed. Crop Ins. Co. v. Merrill*, 332 U.S. 380 (1947); *Mont. Power Co. v. Fed'l Power Comm'n*, 185 F.2d 491, 497 (D.C. Cir. 1950) ("The Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials.") (footnote omitted). Courts similarly are hesitant

to subject the Government to estoppel where doing so jeopardizes compliance with a federal statute. *See Richmond*, 496 U.S. at 424 (noting that estoppel will not support "a claim for payment of money from the Public Treasury contrary to a statutory appropriation").

None of these principles precludes estoppel against the Government here. Indeed, if affirmative misconduct by the Government or its officials ever can justify estoppel against the Government, this surely must be the case. DOJ, with the full knowledge and approval of the Attorney General and other top officials, did everything in its power to extort nearly half a billion dollars worth of extra work from its attorneys without paying a penny, notwithstanding a clear statutory command to the contrary and decades of hand-wringing over DOJ's "unlawful" and "unconscionable" conduct. *See* J.A.I 00432; J.A.II 0046–47, 0127, 0168; A. 135a. This affirmative misconduct stems not from negligence of low-level clerks, but the knowing and deliberate acts of the Department's highest ranking officials. As OLC observed, DOJ implemented a policy of refusing to pay attorneys for their overtime work as a "device" to "frustrate" a statutory command." A. 115a.

Furthermore, Petitioners seek to estop the Executive Branch from invoking a ***regulation***, 5 C.F.R. § 550.111(c), to deny them their ***statutory*** rights under 5 U.S.C. § 5542(a); thus, Petitioners' estoppel claim poses no threat to separation of powers and is not contrary to a statutory appropriation. *See Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982) ("[R]eliance on a separation of powers rationale to preclude estoppel against the government is considerably less persuasive where only an agency's own regulations are at stake than it would be where adherence to government misinformation threatens to contravene an explicit statutory requirement."). Indeed, ***refusing*** to estop the Government under the circumstances of this case threatens separation of powers by permitting the Executive Branch effectively to

nullify statutory rights established by Congress. This case—with its extensive briefing, exhaustive record, and precisely honed issues—offers this Court an ideal opportunity to end the circuit split and provide definitive guidance in a crucial area of the law that touches on individual rights and separation of powers.

III. AT A MINIMUM, GIVEN THE FEDERAL CIRCUIT'S DRAMATIC CHANGE IN THE LAW ON APPEAL, THIS COURT SHOULD SUMMARILY REVERSE THIS CASE TO ALLOW PETITIONERS THE OPPORTUNITY TO PURSUE ALTERNATE THEORIES OF RELIEF.

This Court repeatedly has recognized that if the fundamental law governing a case dramatically changes on appeal, the parties must be given an opportunity on remand to satisfy the new standard, raise new arguments, or introduce new claims that had not been necessary under the law as it previously existed. For example, in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), another case involving an overtime class action, the Ninth Circuit, on appeal, changed the definition of the term "seaman" under 29 U.S.C. § 213(b)(6). 475 U.S. at 714. This Court held that the Ninth Circuit erred in going on to resolve the case by applying that new definition; instead, the court of appeals should have remanded the case to the district court to allow the parties an opportunity to litigate under the new standard. *Id.*

Similarly, in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966), this Court fundamentally changed the law regarding state-law libel claims that arise in labor disputes. It held, "Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given [petitioner] on remand to amend his complaint, if he so desires, to meet these requirements." *Id.* at 66. This Court likewise concluded its decision in *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200 (1995), by stating, "Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced." *Id.* at 237; *see also Wilson v. Seiter*, 501 U.S. 294, 305–06 (1991); *Murray v. United States*, 487 U.S. 533, 543–44 (1988); *Migra v. Warren City Sch. Bd. of Educ.*, 465 U.S. 75, 87 (1984).

In *Doe II*, the Federal Circuit reversed over fifty years of caselaw and held for the first time that, under 5 C.F.R. § 550.111(c), the Government need not pay employees for overtime work they were induced or required to perform if the Government refused to issue specific written authorization for that work. The court expressly stated, "[T]he *Anderson* line of cases is no longer good law." *Doe II*, 372 F.3d at 1357.[8] It then went on to apply the new standard to the facts of this case. Based on its appellate fact-finding, the court granted summary judgment to the Government, in clear violation of *Icicle Seafoods*.

Despite this seismic shift in federal overtime law, the *Doe IV* court affirmed the lower court's refusal to permit Petitioners to raise new theories of relief or to amend their Complaint to bring new claims. It stated that *Doe II* "does not set forth a new legal standard that might allow the Doe plaintiffs to make new arguments before the trial court under

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[8] The "*Anderson* line of cases" included *Buckley v. United States*, 51 Fed. Cl. 174, 217 (2001); *Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993); *DeCosta v. United States*, 22 Cl. Ct. 165, 176–77 (1990); *Manning v. United States*, 10 Cl. Ct. 651, 653 (1986); *Taylor v. United States*, 223 Ct. Cl. 655, 655 (1980); *Fox v. United States*, 416 F. Supp. 593, 597–98 (E.D. Va. 1976); *McQuown v. United States*, 199 Ct. Cl. 858, 867 (1972); *Baylor v. United States*, 198 Ct. Cl. 331, 360 (1972); *Bates v. United States*, 450 F.2d 886, 890–91 (Ct. Cl. 1971); *Rapp v. United States*, 340 F.2d 635, 641 (Ct. Cl. 1964); *Byrnes*, 163 Ct. Cl. at 173–74 (1963); and *Aviles v. United States*, 151 Ct. Cl. 1, 7–8 (1960).

that standard." *Doe IV*, 463 F.3d at 1322. The court explained that Petitioners should have predicted that the dozens of cases upon which they had relied were bad law because "the Doe plaintiffs knew about *Hansen* and *Richmond* before [*Doe II*] was decided and had their opportunity to mount arguments under the principles of those cases." *Id.*

The Federal Circuit's ruling was incorrect. The simple fact that *Schweiker* (in 1981) and *Richmond* (in June 1990), had been published before this case does not mean that this Court had *sub silentio* overruled dozens of Court of Claims and Court of Federal Claims cases. Indeed, several of the cases upon which Petitioners relied were published ***after*** *Schweiker* and *Richmond* and continued to apply *Anderson*. *See, e.g.*, *Buckley*, 51 Fed. Cl. at 217 ("[O]vertime work may be considered 'officially ordered or approved' if the employee was induced to perform overtime," even without an "explicit directive or order"); *Hannon*, 29 Fed. Cl. at 149 (1993); *DeCosta*, 22 Ct. Cl. at 176–77 (Dec. 1990). Even in this case, the Court of Federal Claims concluded that Petitioners' theory of recovery was valid and awarded Petitioners summary judgment. *Doe I*, 54 Fed. Cl. at 418. Furthermore, neither *Schweiker* nor *Richmond* compelled the Federal Circuit to rule that an agency could require an employee to work overtime without being paid.

Thus, there is no basis for the Federal Circuit's unsupported declaration that Petitioners are not entitled to raise new claims because *Doe II* did not fundamentally change the law. Given the Federal Circuit's cataclysmic change in the governing law, this Court—at the very least—should summarily reverse and remand this case to permit Petitioners to raise new claims and pursue alternate avenues of relief that were not necessary under the legal landscape as it formerly existed.

IV. THIS CASE WARRANTS CERTIORARI.

This case presents three of this Court's articulated grounds for granting certiorari: (1) an important question of federal employment law of broad significance to the nation's 2.7 million federal civilian employees; (2) a court of appeals that disregarded this Court's precedents in countenancing the Executive Branch's nullification of valid acts of Congress; and (3) a circuit split as to whether the federal government may ever be estopped for its deceptive and illegal conduct. Although appropriations riders enacted in 1999 and 2000 purport to prohibit federal funds from being used to pay Department of Justice attorneys for any ***future*** overtime work,[9] these provisions do not affect either Petitioners' claims here or the ***continuing*** overtime rights of millions of federal employees in the Government's dozens of other agencies, to whom these riders do not apply.

Now that the Federal Circuit has entered final judgment, this case is ripe for adjudication by this Court. After *Doe II*, Petitioners sought certiorari of the Federal Circuit's interlocutory opinion concerning a single count of the three-count Complaint.[10] The Government encouraged this Court to deny

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[9] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1501, 1501A21 (1999); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, Pub. L. No. 106-553, § 1(a)(2), 114 Stat. 2762, 2762A68 (2000). It is by no means settled whether these riders actually have prospective effect beyond the fiscal years covered by each of the Appropriations Acts. *See Robertson v. Seattle Audobon Soc'y*, 503 U.S. 429, 440 (1992) (noting presumption that appropriations riders are not to be given prospective effect); *see, e.g.*, *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 146–47 (2d Cir. 2002) (holding that appropriations rider imposing restriction on federal funds that applied "hereafter" did not have prospective effect beyond the fiscal year in which it was enacted).

[10] The previous Petition for Certiorari sought review of whether *Schweiker* and *Richmond* barred Petitioners' overtime claims. It also

certiorari because of "the interlocutory nature of [the] petition," Br. for the U.S. in Opp'n at 12, and this Court denied review, 544 U.S. 904 (2005). The procedural difficulties that existed at the time of this prior Petition for Certiorari have now been resolved and a final judgment has been entered denying relief on all grounds under any theory. *Cf. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 n.19 (1979) (discussing grant of certiorari despite an "earlier denial of certiorari . . . at an interlocutory stage in the proceedings"). This case now presents the last, best chance for this Court to address whether the Executive Branch can rely on its own misconduct to frustrate clear statutory rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari.

Respectfully submitted,

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asked this Court to consider whether § 550.111(c) was facially valid and entitled to *Chevron* deference.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-5104

JOHN DOE, on behalf of themselves
and all others similarly situated,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

September 11, 2006, Decided

OPINION

SCHALL, *Circuit Judge*.

Plaintiff John Doe and a class of similarly situated individuals (hereinafter collectively, "the Doe plaintiffs") appeal from the September 17, 2004 judgment of the United States Court of Federal Claims dismissing their complaint. Doe v. United States, No. 98-896 C, slip op. (Fed. Cl. Sept. 17, 2004) ("Doe Summary Judgment Order"). The Doe plaintiffs are Department of Justice ("DOJ") attorneys who sued the government for alleged violations of the overtime provisions of the Federal Employees Pay Act of 1945 ("FEPA"), ch. 212, 59 Stat. 295 (codified as amended at 5 U.S.C. §§ 5542, 5545, 5546 (2000)).[1] The Doe plaintiffs claim that the Court of Federal Claims erred when it dis-

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[1] FEPA has not been amended in relevant part since 1999, when the events relevant to this appeal took place. Thus, all references are to the 2000 version of the United States Code unless otherwise indicated.

missed their claims for overtime pay pursuant to 5 U.S.C. § 5542(a), administratively uncontrollable overtime ("AUO") pay pursuant to 5 U.S.C. § 5545(c)(2), and holiday pay pursuant to 5 U.S.C. § 5546(b). We discern no such error and therefore affirm the judgment of the Court of Federal Claims dismissing the Doe plaintiffs' complaint.

BACKGROUND

I.

The Doe plaintiffs are a class of over 9,000 DOJ attorneys who seek pay for overtime work and holiday work performed between 1992 and 1999. *Doe v. United States*, 372 F.3d 1347, 1349 & n.1 (Fed. Cir. 2004) ("*Doe V*"). The parties do not dispute that the Doe plaintiffs worked overtime and on holidays during this period. *Id.* at 1350. Further, there is evidence supporting the Doe plaintiffs' assertion that DOJ expected and induced the Doe plaintiffs to work overtime and to work on holidays. However, the Doe plaintiffs did not receive any written order or approval from DOJ before performing this work. *Id.* at 1362–64. Even though they did not receive written order or approval, the Doe plaintiffs allege that they are entitled to overtime, AUO, and holiday pay under FEPA because they were expected and induced to work beyond the regularly scheduled work week.

II.

FEPA includes specific provisions governing each of the Doe plaintiffs' three claims.

Section 5542(a) contains the general eligibility requirements for overtime pay under FEPA. Section 5542(a) provides in relevant part:

> For full-time, part-time and intermittent tours of duty, hours of work officially *ordered or approved* in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee

> are overtime work and shall be paid for, except as otherwise provided by this subchapter[.]

5 U.S.C. § 5542(a) (emphasis added). As emphasized above, overtime hours must be "ordered or approved" in order to be compensable. The applicable regulation repeats this requirement by stating that overtime pay must be "[o]fficially ordered or approved." 5 C.F.R. § 550.111(a)(1) (2006).[2] Section 550.111(c) clarifies that "[o]vertime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." (emphasis added). As we noted in *Doe V*, a regulation substantially similar to the present section 550.111(c) has been in effect since 1945, when FEPA was enacted, until the present. 372 F.3d at 1352.

Pursuant to 5 U.S.C. § 5545(c)(2), the head of an agency may provide AUO pay instead of other forms of premium pay such as overtime pay under section 5542(a). Section 5545(c)(2) provides in relevant part:

> The head of an agency, with the approval of the Office of Personnel Management, *may* provide that—
>
> . . .
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, *shall* receive premium pay for this duty on an annual

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[2] The relevant provisions of the Code of Federal Regulations have not been amended since 1999, when the events relevant to this appeal took place. Thus, all references are to the 2006 version of the Code of Federal Regulations.

> basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. . . .

(emphases added). The Office of Personnel Management ("OPM") has promulgated regulations governing AUO payment policy at 5 C.F.R. §§ 550.151–.163. Sections 550.154 and 550.162–.163 set forth rates for premium pay for AUO and other payment provisions specific to AUO. Sections 550.151–.153 establish criteria for determining which positions meet the statutory requirements for AUO pay.

Under the regulations, OPM requires that agencies determine prospectively which positions meet the criteria for AUO pay set forth in sections 550.151–.153. Specifically, the applicable regulation states:

> The head of each agency, or an official who has been delegated authority to act for the head of an agency in the matter concerned, is responsible for . . . . [d]etermining in accordance with section 5545(c) of Title 5, United States Code, and this subpart, which employees shall receive premium pay on an annual basis under § 550.141 or § 550.151. These determinations may not be retroactive.

5 C.F.R. § 550.161(b).

Pursuant to section 550.161(b), DOJ published Order 1551.4A in 1975. The order sets forth a general policy of providing AUO pay to persons meeting the statutory requirements in a section entitled "POLICY." Paragraph 6 of the order elaborates on the requirements for receiving AUO pay and repeats much of the language of 5 C.F.R. § 550.151–.153. Paragraph 7 is entitled "AUTHORIZED PERSONS" and provides:

> Premium pay under this order may be paid to eligible employees assigned to the classes of positions listed in

> Appendix 1 to this order. The Assistant Attorney General for Administration will authorize administratively uncontrollable overtime pay for additional classes of positions upon the request of a bureau director which shows that the positions meet the criteria set out in paragraph 6.

Appendix 1 lists 6 positions: (1) Airplane pilot engaged in air-to-ground border patrol activities, (2) Border patrol agent, (3) Criminal investigator, (4) General investigator, GS-9 and above, (5) Officer-in-charge, Immigration and Naturalization Service domestic office, engaged in investigative duties, and (6) Immigration officer, foreign area, engaged in investigative duties. "Attorney" is not listed.

5 U.S.C. § 5546(b) concerns eligibility for holiday pay under FEPA. Section 5546(b) provides in relevant part:

> (b) An employee who performs work on a holiday . . . is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—
>
> (1) in excess of 8 hours; or
>
> (2) overtime work as defined by section 5542(a) of this title.

The regulations governing authorization for holiday pay provide as follows:

> (a) Except as otherwise provided in this subpart, an employee who performs holiday work is entitled to pay at his or her rate of basic pay plus premium pay at a rate equal to his or her rate of basic pay for that holiday work that is not in excess of 8 hours.
>
> (b) An employee is entitled to pay for overtime work on a holiday at the same rate as for overtime work on other days.

> (c) An employee who is *assigned to duty* on a holiday is entitled to pay for at least 2 hours of holiday work.
>
> (d) An employee is not entitled to holiday premium pay while engaged in training, except as provided in § 410.402 of this chapter.

5 C.F.R. § 550.131 (emphasis added). Section 550.132 also concerns holiday pay. It is entitled "Relation to overtime, night, and Sunday pay" and provides:

> (a) Premium pay for *holiday work* is in addition to overtime pay or night pay differential, or premium pay for Sunday work payable under this subpart and is not included in the rate of basic pay used to compute the overtime pay or night pay differential or premium pay for Sunday work.
>
> (b) Notwithstanding premium pay for holiday work, the number of hours of holiday work are included in determining for overtime pay purposes the total number of hours of work performed in the administrative workweek in which the holiday occurs.
>
> (c) The number of regularly scheduled hours of duty on a holiday that fall within an employee's basic workweek on which the employee is excused from duty are part of the basic workweek for overtime pay computation purposes.

(emphasis added). "Holiday work" is defined at 5 C.F.R. § 550.103 as "nonovertime work performed by an employee during a regularly scheduled daily tour of duty on a holiday designated in accordance with § 610.202 of this chapter." Section 610.202 is entitled "Determining the holiday" and sets forth guidelines for determining which day of a week is to be treated as an employee's holiday.

III.

On March 24, 2000, in *Doe v. United States*, 46 Fed. Cl. 399, 402 (2000) ("*Doe I*"), the Court of Federal Claims granted the government's motion to dismiss the Doe plaintiffs' claims for AUO pay for lack of jurisdiction under the Tucker Act.[3] In *Doe I*, the Court of Federal Claims began by examining the language of section 5545(c)(2), which governs AUO pay, and found that the language of the statute was not in and of itself mandatory. *Id.* at 401. The court found that "[t]he discretion to determine whether an employee will be provided premium pay under this section rests with the head of the Agency, with the approval of the Office of Personnel Management." *Id.* Turning to the agency's policies, the court noted that DOJ Order 1551.4A concerned premium pay for AUO and that "Attorney" was not listed as a covered position in Appendix 1 to the order. *Id.* Based on the foregoing, the court held that there was no requirement that the agency pay compensation to attorneys and dismissed the Doe plaintiffs' claim for AUO pay. *Id.* at 402. The court's decision dismissing the Doe plaintiffs' claims for AUO pay in *Doe I* has not been appealed previously.

The Doe plaintiffs' claims for overtime pay under section 5542 and holiday pay under section 5546(b) have already been the subject of several decisions in the Court of Federal Claims and one appeal. On September 1, 2000, the Court of

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[3] In *Doe I*, the court did not expressly state that it based its decision to dismiss on the lack of Tucker Act jurisdiction. *See Doe I*, 46 Fed. Cl. at 402. However, we believe that the basis of the court's decision was jurisdictional. First, in a footnote the court rejected the Doe plaintiffs' argument that the Court of Federal Claims "may exercise jurisdiction over claims that it would not have jurisdiction to hear standing alone when necessary to effectuate judgment over an entire claim." *Id.* at 402 n.4. This suggests that the court dismissed the AUO claim for lack of jurisdiction. Second, the court's determination that section 5545(c)(2) is discretionary suggests that the court dismissed the AUO claim because it found section 5545(c)(2) was not money-mandating as required for Tucker Act jurisdiction.

Federal Claims denied the government's motion to dismiss the Doe plaintiffs' claims for overtime pay under section 5542(a) and holiday pay under section 5546(b). *Doe v. United States*, 47 Fed. Cl. 594, 595 (2000) ("*Doe II*"). The court then granted the Doe plaintiffs' motion for summary judgment on the issue of liability and denied the government's cross-motion. *Doe v. United States*, 54 Fed. Cl. 404, 418 (2002) ("*Doe III*"). The court held that DOJ "ordered and approved" overtime within the meaning of section 5542 by expecting and inducing attorneys to work more than forty hours a week. *Id.* at 418. *Doe III* makes no mention of holiday pay under section 5546(b). However, the motion granted was for summary judgment—not partial summary judgment.

We granted the government's petition for interlocutory appeal, *Doe v. United States*, 67 Fed. Appx. 596, 597 (2003) ("*Doe IV*"), and reversed the Court of Federal Claims's grant of summary judgment in *Doe III*, *Doe V*, 372 F.3d at 1364. The focus of our decision in *Doe V* was the Doe plaintiffs' claim for overtime pay under section 5542(a). In *Doe V*, we examined a long line of cases interpreting the written order requirement for overtime pay under section 5542(a). *Doe V*, 372 F.3d at 1352–54. We noted that *Anderson v. United States*, 136 Ct. Cl. 365 (1956) ("*Anderson I*"), was the first of a line of cases in which the Court of Claims awarded overtime pay under FEPA to employees who had been induced to work overtime without any written order or authorization. *Doe V*, 372 F.3d at 1354. We found that the *Anderson* line of cases "also suggested that equitable considerations prevented the government from denying overtime compensation where it 'induced' overtime work." *Id.* We then determined that *Schweiker v. Hansen*, 450 U.S. 785, 101 S. Ct. 1468, 67 L. Ed. 2d 685 (1981), and *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990), effectively overruled *Anderson I* and its progeny. *Doe V*, 372 F.3d at 1355–57. We held that "the *Anderson* line of cases is no longer good law and that the written order

requirement is not invalid on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute or because it is inequitable." *Id.* at 1357. We then held that the written order requirement set forth at 5 C.F.R. § 550.111(c) was more than a mere administrative instruction, *id.* at 1358, and that the regulation was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Doe V*, 372 F.3d at 1362. After upholding the validity of the regulation, we examined whether the writing requirement had been met by DOJ's actions. *Id.* at 1362–64. On this point, we found that many of the Doe plaintiffs' arguments merely repeated their previously-rejected contentions that the written order requirement was invalid or merely an administrative instruction. *Id.* at 1362. We found that the documents that the Doe plaintiffs asserted gave them written authorization to work overtime, such as the United States Attorney's Manual, did not actually authorize overtime work. *Id.* at 1363. We also rejected the Doe plaintiffs' argument that the keeping of two sets of time records, one for pay purposes and one for determining actual hours worked, was evidence of written authorization and approval. *Id.* at 1363–64. We found instead that these records merely showed that the agency had awareness that attorneys worked extra hours—not that they had been authorized to receive overtime pay for working extra hours. *Id.* at 1364. Based on the foregoing, we not only reversed the grant of summary judgment in favor of the Doe plaintiffs, but also held that summary judgment should have been granted in favor of the government because the Doe plaintiffs' overtime was not "ordered or approved" as required by section 5542(a). *Id.* at 1349, 1364. Although we granted summary judgment on liability, we made no mention in *Doe V* of holiday pay under section 5546(b).

Pursuant to our direction in *Doe V*, the Court of Federal Claims directed an entry of summary judgment in favor of the

government. *Doe Summary Judgment Order*, slip op. at 1. The Doe plaintiffs then filed a motion for reconsideration before the Court of Federal Claims in which they argued that all three of their claims—for AUO pay, overtime pay, and holiday pay—survived our decision in *Doe V*. The Court of Federal Claims rejected the argument, holding that the doctrine of the law of the case barred reconsideration of the overtime pay claim and that the holiday pay claim was barred by implication. *Doe v. United States*, 63 Fed. Cl. 798, 804 (2005) ("*Doe VI*"). Thus, the Court of Federal Claims denied the Doe plaintiffs' motion for reconsideration. *Id.*

The Doe plaintiffs now appeal (1) the dismissal of the AUO pay claim in *Doe I* and (2) the grant of summary judgment in favor of the government on the overtime and holiday pay claims in the Doe Summary Judgment Order. We have jurisdiction over the Doe plaintiffs' appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

We review de novo the Court of Federal Claims's grant of summary judgment in favor of the government. *Info. Sys. & Networks Corp. v. United States*, 437 F.3d 1173, 1176 (Fed. Cir. 2006). We also review de novo the Court of Federal Claims's dismissal of a claim for lack of jurisdiction. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1363 (Fed. Cir. 2005); *Doe v. United States*, 100 F. 3d 1576, 1579 (Fed. Cir. 1996).

II.

We begin with the Doe plaintiffs' claims for overtime pay under section 5542. The Doe plaintiffs argue that the Court of Federal Claims erred in dismissing their claims for overtime pay under section 5542 because they had an alternative theory of liability that was not addressed in our decision in *Doe V*.

They characterize their alternative theory as an "as applied" challenge to 5 C.F.R. § 550.111(c)'s requirement of written approval for overtime pay. Instead of arguing that 5 C.F.R. § 550.111(c) is invalid, the Doe plaintiffs argue that DOJ effectively eliminated their ability to acquire a written order or approval for working overtime from a higher level official, as required by the regulation. Therefore, they argue, their overtime should be considered authorized and approved. This argument was not foreclosed by *Doe V*, the Doe plaintiffs urge, because it was not raised in the certified order for the interlocutory appeal that led to that decision. They argue that *Doe V* only overruled the *Anderson I* line of cases to the extent that the cases held the writing requirement invalid. In contrast, the Doe plaintiffs argue that the *Doe V* court "said nothing about whether an agency could avoid its obligations under FEPA by refusing to implement a reasonable or rational system for obtaining the very writings the Court held were required." Appellants' Br. at 48. Thus, the Doe plaintiffs contend that cases supporting their "as applied" challenge, such as *Adams v. United States*, 162 Ct. Cl. 766 (1963), *Bilello v. United States*, 174 Ct. Cl. 1253 (1966), and *Anderson v. United States*, 201 Ct. Cl. 660 (1973) ("*Anderson II*"), remain good law.

The Doe plaintiffs also argue that they should be allowed to modify their claims for overtime pay under section 5542 because *Doe V* changed the controlling legal standard. The Doe plaintiffs argue that the fact that *Hansen*, 450 U.S. 785, 101 S. Ct. 1468, 67 L. Ed. 2d 685, and *Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387, the Supreme Court cases that overruled *Anderson I*, predate their complaint makes no difference because *Anderson I* was continually relied upon until *Doe V*.

The government counters that *Doe V* forecloses any consideration of the "alternative arguments" presented by the Doe plaintiffs. It recites our holding in *Doe V* that no

compensation could be awarded for work that was not "ordered and approved in strict compliance with [section 550.111(c)]." At the same time, it argues that the Doe plaintiffs are merely repeating the same argument they raised in *Doe V*: that "the governing OPM regulation should be disregarded in light of the government's asserted misconduct." In support of this contention, the government recites passages in the Doe plaintiffs' briefs in the *Doe V* appeal that are nearly identical to passages in the present briefs. Contrary to the Doe plaintiffs' arguments, the government argues, *Doe V* rejected both the *Anderson* notion that a writing requirement was invalid and that equitable considerations, such as the failure to implement a workable system for authorizing overtime, could entitle workers to overtime even without written authorization. Appellee's Br. at 28–29 (citing *Doe V*, 372 F.3d at 1355).

The government contends that the Doe plaintiffs' request that they be allowed to amend their previous arguments to accommodate a new legal standard should not be entertained. The government argues that the Doe plaintiffs made the same arguments in their petition for a rehearing in *Doe V* and that because rehearing was not granted in that case, they should not be able to get are hearing now. Further, the government asserts that the denial of the petition for rehearing was correct because *Doe V* did not create a new legal standard. Rather, *Doe V* required compliance with 5 C.F.R. § 550.111(c), which has been in effect since 1945. The government argues that the *Doe V* panel considered evidence purportedly showing compliance with section 550.111(c)'s writing requirement at the Doe plaintiffs' request. The government contends that the *Doe V* panel rejected the Doe plaintiffs' argument, foreclosing further consideration of the issue.

We agree with the government that *Doe V* previously determined that the Doe plaintiffs do not have a viable claim for overtime pay under section 5542 and therefore forecloses

the Doe plaintiffs' current argument that DOJ's system for acquiring written authorization pursuant to section 550.111(c) is unreasonable. This "as applied" argument is foreclosed by our finding in *Doe V* that *Anderson I*, 136 Ct. Cl. 365, was overruled by the Supreme Court's decisions in *Hansen*, 450 U.S. 785, 101 S. Ct. 1468, 67 L. Ed. 2d 685, and *Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387. *Doe V*, 372 F.3d at 1357. In *Anderson I*, the employer induced employees to work overtime and then refused payment because of a written approval requirement. 136 Ct. Cl. at 371. The *Anderson I* court struck down the writing requirement. *Id.* In *Doe V*, we held that *Anderson I* had been overruled to the extent that it held that "the OPM regulation was invalid because it added a procedural writing requirement to the substantive requirements of FEPA or because the result was inequitable." *Doe V*, 372 F.3d at 1355 (emphasis added). In essence, we upheld the writing requirement as valid and stated that any equity-based attack to the reasonableness of the writing requirement must fail. The Doe plaintiffs' argument in this appeal is nothing but an equity-based attack on the reasonableness of the writing requirement because the Doe plaintiffs merely repeat the equity-based arguments that we rejected in *Doe V*. In *Doe V*, they argued that it was inequitable to encourage overtime that was foreclosed by a writing requirement. Now they argue that it is inequitable to encourage overtime that was foreclosed by a writing requirement that was practically impossible to meet. The latter is merely an extension of the former, which we have already rejected. *See id.*

The Doe plaintiffs' reliance on *Adams*, 162 Ct. Cl. 766, *Bilello*, 174 Ct. Cl. 1253, and *Anderson II*, 201 Ct. Cl. 660, is also misplaced. In *Doe V*, we classified *Adams* as one of the *Anderson I*, 136 Ct. Cl. 365, line of cases, which was overruled by *Hansen* and *Richmond*. *Doe V*, 372 F.3d at 1354. We cited *Bilello* in *Doe V* for the proposition that overtime that was approved only by a supervisor who lacked

authority to approve the overtime was not compensable. *Id.* at 1363. Thus, our citation to *Bilello* in *Doe V* was not an endorsement of attacks on the reasonableness of agency implementation of a regulation like the one the Doe plaintiffs presently challenge. In the *Anderson II* decision, the Court of Claims interpreted "regularly scheduled" broadly to include overtime induced by unauthorized persons because the court was "reluctant to impute to the VA an intent to frustrate the apparent will of Congress that overtime work shall be paid for." 201 Ct. Cl. at 664. The Doe plaintiffs quote this portion of *Anderson II* for the proposition that when an agency fails to create a reasonable system for authorizing overtime, courts award overtime pay. In actuality, the *Anderson II* court stated that when construing the overtime statute's "regularly scheduled" language, it was appropriate to keep in mind the intent of Congress to pay for overtime. *Id.* Any statutory or regulatory construction argument is foreclosed in the present case, however, by *Doe V*. In *Doe V* we established that OPM's regulation at 5 C.F.R. § 550.111(c), which requires written approval for overtime pay, is a reasonable interpretation of "ordered or approved" in 5 U.S.C. § 5542, and therefore entitled to *Chevron* deference. *Doe V*, 372 F.3d at 1358–59. The Doe plaintiffs are asking us to reevaluate that assessment and therefore their arguments must fail.

Finally, *Doe V* does not set forth a new legal standard that might allow the Doe plaintiffs to make new arguments before the trial court under that standard. *Hansen* and *Richmond*, which were our bases for finding that *Anderson I* had been overruled, were decided in 1981 and 1990, respectively. Thus, the Doe plaintiffs knew about *Hansen* and *Richmond* before *Doe V* was decided and had their opportunity to mount arguments under the principles of those cases.

III.

Turning to the Doe plaintiffs' claim for AUO pay, the Doe plaintiffs argue that the Court of Federal Claims erred in

Doe I when it dismissed their claim for AUO pay pursuant to section 5545(c)(2) for lack of jurisdiction. They acknowledge that the statute governing AUO pay contains the discretionary word "may." Despite this discretionary language, the Doe plaintiffs argue that section 5545(c)(2) is money-mandating for two reasons. First, they argue that the word "may" in section 5545(c)(2) gives the agency the discretion to establish how it will pay overtime, but not whether AUO pay will be paid. Thus, an agency has the choice to elect to pay either overtime pay under section 5542(a) or AUO pay under 5545(c)(2). Although the agency can choose between overtime pay and AUO pay, according to the Doe plaintiffs, the agency must pay for hours worked. The Doe plaintiffs' second argument as to why section 5545(c)(2) is money-mandating is that once DOJ makes an election to compensate AUO, any employee meeting the statutory requirements must be paid.

With regard to the merits of their claim for AUO pay, the Doe plaintiffs argue that the language of paragraph 5 of DOJ Order 1551.4A makes AUO pay required for all employees whose work requires "substantial amounts of irregular or occasional overtime," including attorneys. Based on *Hannon v. United States*, 29 Fed. Cl. 142 (1993), the Doe plaintiffs argue that because DOJ had a policy to provide AUO pay, the plaintiffs are entitled to AUO pay so long as they qualify under the statute and regulation. They also argue that the list of covered positions in Appendix 1 to DOJ's order is non-exclusive and that therefore attorneys are covered despite not being listed. In response to a question on this point at oral argument, the Doe plaintiffs filed supplemental briefing. In that briefing, they argue that the Appendix 1 list is non-exclusive because, in a 1988 memorandum, the Assistant Attorney General for Administration ("AAGA") authorized the Immigration and Naturalization Service ("INS") Commissioner to extend AUO pay coverage from the positions in the list to include "immigration officers," as defined in 8

C.F.R. § 103.1.[4] Because more positions receive AUO pay than those listed in Appendix 1, the Doe plaintiffs argue, the list is non-exclusive.

The government responds to the Doe plaintiffs' jurisdictional arguments by noting that the jurisdictional and merits inquiry converge in this case. Even if the court below erred by dismissing on jurisdiction, they argue that dismissal on the merits was required without further hearing.

The government counters the Doe plaintiffs' arguments on the merits of the AUO pay claim by contending that section 5545(c)(2) gives "the head of an agency" the discretion to decide if any employee is entitled to AUO pay. The government recounts the legislative history of section 5545(c)(2) and the applicable regulations, which expressly state that AUO pay determinations may not be made retroactively. *See* 5 C.F.R § 550.161(b). If AUO pay cannot be awarded retroactively, the government argues, then the agency must use its discretion to prospectively determine which employees will be awarded AUO pay. The government argues that DOJ did

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[4] In 1988, when the AAGA memorandum was written, 8 C.F.R. § 103.1(q) provided:

> Any immigration inspector, immigration examiner, border patrol agent, aircraft pilot, airplane pilot, helicopter pilot, deportation officer, detention officer, detention service officer, detention guard, investigator, special agent, intelligence officer, intelligence agent, general attorney, applications adjudicator, contact representative, Chief Legalization Officer, Supervisory Legalization Officer, Legalization Adjudicator, Legalization Officer and Legalization Assistant, or senior or supervisory officer of such employees is hereby designated as an immigration officer authorized to exercise the powers and duties of such officer as specified by the Act and this chapter.

Notably, "general attorney" is listed in the regulation as being an "immigration officer." However, the 1988 AAGA memorandum specifically exempted "general attorney" from receiving AUO pay. "Immigration officer" is currently defined at 8 C.F.R. § 103.1(b).

not exercise its discretion to give attorneys AUO pay. The government turns to Appendix 1 to DOJ Order 1551.4A, which the government notes did not list attorneys as a group authorized to receive AUO pay. This list, the government argues, is exclusive because the order sets forth procedures for adding positions to the list. It notes that these procedures were followed when the INS positions mentioned in the 1988 AAGA memorandum were added to the list. Further, the government points out that the 1988 AAGA memorandum authorized AUO pay for "immigration officers," as defined in 8 C.F.R. § 103.1, but specifically exempted "general attorneys" from coverage. The government also argues that the Doe plaintiffs' position, if adopted, would effectively nullify DOJ Order 1551.4A, by making it the courts' duty to determine which positions meet statutory and regulatory requirements for AUO pay.

The Court of Federal Claims's jurisdiction pursuant to the Tucker Act is derived from the underlying substantive law that is the subject of a suit. *Samish*, 419 F.3d 1355, 1364 (2005). A substantive law provides jurisdiction only if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Mitchell*, 463 U.S. 206, 217, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"). This requirement is commonly termed as the "money-mandating" requirement. *Id.; Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part). The "fair interpretation" standard articulated in *Mitchell II* is met when a statute is "reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–73, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003). Thus, jurisdiction exists under the Tucker Act so long as there is a "fair inference" that a statute is money-mandating. *Id.* at 473; *see also Samish*, 419 F.3d at 1364. We have acknowledged that the jurisdictional inquiry and merits inquiry may blend together under the Tucker Act. *Fisher*, 402

F.3d at 1173. In *Fisher* we clarified the distinction between the jurisdictional and merits inquiry under the statute. 402 F.3d at 1175–76. The jurisdictional requirement is met if a statute or regulation is "money-mandating." *Id.* at 1175. However, a party bringing suit under the Tucker Act may then lose on the merits if he or she is not one of the persons entitled to pay under the statute or regulation. *See Fisher*, 402 F.3d at 1176 (citing *Banks v. Garrett*, 901 F.2d 1084, 1087–88 (Fed. Cir. 1990); *Sawyer v. United States*, 930 F.2d 1577 (Fed. Cir. 1991)).

A statute is not money-mandating when it gives the government complete discretion over the decision whether or not to pay an individual or group. *See Doe v. United States*, 100 F.3d 1576, 1582 (Fed. Cir. 1996); *see also McBryde v. United States*, 299 F.3d 1357, 1362 (Fed. Cir. 2002). There is a presumption that the use of the word "may" in a statute creates discretion. *McBryde*, 299 F.3d at 1362. However, this presumption of discretion may be rebutted by "the intent of Congress and other inferences that we may rationally draw from the structure and purpose of the statute at hand." *Id.* We have found that a statute is not wholly discretionary, even if it uses the word "may" when an analysis of congressional intent or the structure and purpose of the statute reveal one of the following: (1) the statute has "clear standards for paying" money to recipients, (2) the statute specifies "precise amounts" to be paid, or (3) the statute compels payment once certain conditions precedent are met. *Samish*, 419 F.3d at 1364–65 (citing *Perri v. United States*, 340 F.3d 1337, 1342–43 (Fed. Cir. 2003)); *see also Fisher*, 402 F.3d at 1175 (finding that a statute is money-mandating because it mandates payment when the statutory requirements are met).

The first issue before us is whether a statute using the word "may," as used in 5 U.S.C. § 5545(c)(2), is discretionary. We find that the Doe plaintiffs are correct that 5 U.S.C.

§ 5545(c)(2) is a money-mandating statute. As previously noted, section 5545(c)(2) provides:

> The head of an agency, with the approval of the Office of Personnel Management, may provide that—
>
> . . .
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. . . .

By using the word "may," the statute gives the "head of an agency" the discretion to allow AUO pay for employees in particular positions, although this discretion is somewhat limited because the agency may only award AUO pay to employees in positions that meet the requirements listed in section 5545(c)(2). Further, once the agency makes a determination that a particular position is entitled to AUO pay, the employee "shall" receive premium pay under the statute. Thus, the statute is money-mandating because once a condition is met, namely that the head of an agency states that a position meets the criteria listed in subsection (c)(2), the statute requires payment to employees with that position. See *Fisher*, 402 F.3d at 1175; *Samish*, 419 F.3d at 1364–65 (citing *Perri*, 340 F.3d at 1342–43). Therefore, the Court of Federal Claims erred to the extent that it dismissed the Doe plaintiffs' claim for AUO pay for lack of jurisdiction in *Doe I*.

However, although the court erred in dismissing the Doe plaintiffs' AUO pay claim for lack of jurisdiction, the error

was harmless because the claim should have been dismissed on the merits. While section 5545(c)(2) may be money-mandating once certain conditions are met, the Court of Federal Claims correctly found that it does not require payment to the Doe plaintiffs. The regulations set forth at 5 C.F.R. §§ 550.151-.163 do not state that any person meeting the statutory requirements for AUO pay is entitled to premium pay. Instead, the regulations establish a system whereby agencies must decide if a particular position meets the requirements of the statute before employees with that position may be awarded AUO pay. *See* 5 C.F.R. § 550.153(a). The regulations require that the head of each agency or a designated person determine which employees meet the statutory requirements for AUO pay prospectively. 5 C.F.R. § 550.161(b). This determination must be based on the criteria set for that 5 C.F.R. §§ 550.151–.153. Pursuant to this regulatory mandate, DOJ stated in paragraph 7 of DOJ Order 1551.4A that the positions listed in Appendix 1 to the order are covered positions. "Attorney" is not one of the listed covered positions. Contrary to the Doe plaintiffs' arguments, the Appendix 1 list is an exclusive list except to the extent that positions are authorized to receive AUO pay under the procedures set forth in Paragraph 7 of DOJ Order 1551.4A. Paragraph 7 states that the AAGA "will authorize [AUO] pay for additional classes of positions upon the request of a bureau director which shows that the positions meet the criteria set out in paragraph 6." Thus, the only way to receive AUO pay for a position not on the Appendix 1 list is by seeking and receiving authorization from the AAGA. Contrary to the Doe plaintiffs' arguments, the 1988 AAGA memorandum cited in their supplemental authority actually illustrates the exclusive nature of the Appendix 1 list. The 1988 AAGA memorandum followed the procedures set forth in Paragraph 7 of DOJ Order 1551.4A to authorize the position of "immigration officer" as defined in 8 C.F.R. § 103.1 to receive AUO pay. Thus, 5 U.S.C. § 5545(c)(2)

does not require payment to all qualified persons once the agency has exercised its discretion to implement a program. Instead, it requires payment once an agency has designated a position as qualified. Here, the agency did not designate "attorney" as a qualified position and the Doe plaintiffs admit that they do not fall under one of the six qualified positions listed in Appendix 1. Therefore, the Doe plaintiffs' claims should have been dismissed on the merits because, as attorneys, they have no basis for entitlement to AUO pay under § 5545(c)(2) or 5 C.F.R. §§ 550.151–.163.

Although *Hannon* involves the same statute and the same DOJ order, it is unpersuasive in this case. In *Hannon*, the Court of Federal Claims found that it had jurisdiction under section 5545(c)(2) to hear claims for AUO pay brought by Diversion Investigators for the Drug Enforcement Agency. 29 Fed. Cl. at 150. The Diversion Investigators argued that they were "criminal investigators" under DOJ Order 1551.4A and therefore should have received AUO pay. *Id.* at 145. In response to a jurisdictional challenge, the court found that section 5545(c)(2) was money-mandating once a program was implemented. *Id.* at 147–48. DOJ Order 1551.4A demonstrated that DOJ had implemented a program for AUO. *Id.* at 148. Therefore, the court found that it had jurisdiction to evaluate whether or not the Diversion Investigators were "criminal investigators" under DOJ Order 1551.4A and therefore entitled to compensation under the statute. *See id.* The present case is distinguishable from the *Hannon* case because the Doe plaintiffs do not claim that they fall into one of the six covered positions listed in Appendix A of DOJ Order 1551.4A. Therefore, although section 5545(c)(2) gives the Court of Federal Claims jurisdiction as stated in *Hannon*, the Doe plaintiffs' claim should have been dismissed on the merits because the Doe plaintiffs do not hold a position covered by DOJ Order 1551.4A.

IV.

With regard to the Doe plaintiffs' claim for holiday pay, the Doe plaintiffs argue that their claim was not considered in *Doe IV* or *Doe V* and therefore should not have been rejected on summary judgment. They note that the word "holiday" did not even appear in the briefing at the summary judgment stage. Further, the Doe plaintiffs argue that the government conceded that a different standard applies to holiday pay and overtime pay under section 5542. More specifically, they note that the government stated that holiday work must be "scheduled in advance" rather than "ordered or approved" like overtime pay under section 5542. The Doe plaintiffs then dedicate the remainder of their brief to arguments as to why their holiday work was "regularly scheduled."

The government argues that the Doe plaintiffs' arguments regarding holiday pay are new on appeal and therefore inappropriate. Further, the government argues that the Doe plaintiffs chose to merge their arguments on holiday pay with their overtime pay arguments and thus submitted themselves to the decision in *Doe V*. In support of this argument, the government notes that the same arguments about inducement that the Doe plaintiffs made in the Court of Federal Claims in connection with their overtime pay claim under section 5542(a) were made in connection with their holiday pay claim under section 5546(b). The government also argues that the plaintiffs filed a cross-motion for summary judgment rather than a partial motion for summary judgment in *Doe IV* and therefore expressly joined their holiday pay claim to their overtime pay claim.

Finally, the government argues that if we were to allow the Doe plaintiffs to reopen their holiday pay claims, the claims would fail as a matter of law. In support of this argument, the government points to the legislative history of the holiday pay statute, which it says shows that mere performance of holiday

hours without prior formal scheduling does not entitle a person to holiday pay.

Although *Doe III*, *Doe IV*, and *Doe V* make no mention of the holiday pay claim pursuant to section 5546(b), we agree with the Court of Federal Claims that the Doe plaintiffs' claim for holiday pay is barred by our decision in *Doe V*. Our review of the record reveals that the Doe plaintiffs did not seek to separate their claim for holiday pay from their claim for overtime pay until after *Doe V* issued. In their initial complaint, the Doe plaintiffs stated in their holiday pay count that they had been induced and encouraged to work on holidays, just as they claimed in their overtime count that they were induced and encouraged to work overtime. Compl. at 16, 20. Instead of distinguishing the theory of liability for the holiday pay claim and the overtime pay claim, the Doe plaintiffs explicitly bound the two claims together by filing a motion for summary judgment on liability—not partial summary judgment—and then presenting their inducement and encouragement arguments. The *Doe III* decision thus granted the Doe plaintiffs' motion for summary judgment on liability for both claims even though only section 5542(a) was explicitly addressed. 54 Fed. Cl. at 418. In their opposition to the government's motion for interlocutory appeal, the Doe plaintiffs did not argue that their holiday pay claim had not been addressed by the *Doe III* decision. In addition, in their briefing in *Doe V* and the subsequent petition for rehearing, the Doe plaintiffs likewise did not mention the holiday pay claim. Under the circumstances, we conclude that the Doe plaintiffs were content to have their holiday pay claim pursuant to section 5546(b) joined with their claim for overtime pay pursuant to section 5542(a) until the *Doe III* liability determination was reversed in *Doe V*. Only when the liability determination was reversed on appeal did the Doe plaintiffs raise their argument that the theory for liability on the holiday pay claim was distinct from the overtime pay claim. The Doe plaintiffs should have raised the issue of the

distinction between their holiday pay claim and their overtime pay claim before that time, however. Because they did not, the issue was waived. *See United States v. Husband*, 312 F.3d 247, 250–51 (7th Cir. 2002) (stating that, after a first appeal, "any issue that could have been but was not raised on appeal is waived . . . ."); *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (stating that when an appellate mandate has issued, the mandate rule "forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were not raised in the district court").

CONCLUSION

We affirm the Court of Federal Claims's entry of summary judgment in favor of the government on the Doe plaintiffs' section 5542 overtime pay and section 5546(b) holiday pay claims. Although we find that the Court of Federal Claims erred in ruling that it lacked jurisdiction over the Doe plaintiffs' claim for AUO pay under section 5545(c)(2), the error was harmless because the claim should have been dismissed on the merits. We therefore affirm the court's dismissal of the Doe plaintiffs' claim for AUO pay, but find that the dismissal should have been based on the merits of the claim rather than on lack of jurisdiction.

COSTS

Each party shall bear its own costs.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 98-896C

JOHN DOE, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

February 2, 2005 Filed

OPINION AND ORDER

HODGES, *Judge*.

Plaintiffs moved for reconsideration of the September 16, 2004 Order entering summary judgment for the Government pursuant to the Federal Circuit's Mandate. They argue that (1) neither this court nor the Federal Circuit has ruled on their holiday pay claim; that (2) neither court has addressed all their arguments on the overtime pay claim; and that (3) they are entitled to offer new theories of recovery because the Circuit "departed from established precedent."

The Federal Circuit did not rule directly on the holiday pay issue, but the Circuit's ruling on overtime pay controls plaintiffs' holiday pay claim by necessary implication. This Opinion and Order supplements the September 2004 Order directing entry of summary judgment for defendant. We do not have the authority to reopen issues that the Federal Circuit decided on interlocutory appeal.

BACKGROUND

Plaintiffs brought a class action against the United States on behalf of current and former Department of Justice attorneys, seeking overtime pay under the Federal Employees Pay Act. 5 U.S.C. §§ 5542, 5543, 5545(c)(2), and 5546. Sections 5542 and 5543 authorize premium pay or compensatory time for overtime work that is ordered or approved. Section 5545(c)(2) contains a procedure for an agency to pay administratively uncontrollable overtime. The parties filed cross-motions for summary judgment on liability.[1]

We granted plaintiffs' motion for summary judgment on liability. *Doe v. United States*, 54 Fed. Cl. 404 (2002). The liability ruling did not address plaintiffs' holiday pay claim specifically. It referred to the claim for administratively uncontrollable overtime, which had been dismissed earlier. *Doe*, 54 Fed. Cl. at 405 n.2. We certified the liability ruling for interlocutory appeal:

> After a review of the parties' arguments and the record of this case, we find that controlling questions of law are involved, with respect to which there are substantial grounds for difference of opinion. An immediate appeal from the court's November 14, 2002 Opinion and Order in this case may materially advance its resolution.

Doe v. United States, No. 98-896 C (Fed. Cl. Jan. 17, 2003).

The Federal Circuit agreed to interlocutory review of the liability ruling:

> This court determines for itself whether it will grant permission to appeal an interlocutory order certified by a trial court. Such a ruling is within this court's complete discretion. We note that a damages trial would neces-

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[1] Additional information may be found in earlier published opinions. *See Doe v. United States*, 46 Fed. Cl. 399 (2000) and *Doe v. United States*, 47 Fed. Cl. 594 (2000).

> sarily be complex and time-consuming for both sides and the trial court. Thus, deciding the liability issue now serves the interests of all involved.

Doe v. United States, 67 Fed. Appx. 596 (Fed. Cir. 2003) (citations omitted).

The Federal Circuit issued an Opinion on June 23, 2004. The accompanying Judgment provided: "This Cause having been heard and considered, it is Ordered and Adjudged: Reversed." The June 2004 Opinion stated that the trial court should have ruled for the Government on summary judgment. *Doe v. United States*, 372 F.3d 1347, 1349 (2004). The Federal Circuit explained that

> the overtime here was not officially ordered or approved in writing as required by the regulation, [so] we hold that the plaintiffs were not entitled to compensation under [the Federal Employees Pay Act]; reverse the Court of Federal Claims' grant of summary judgment in the plaintiffs' favor . . . and hold that summary judgment *should have been granted in favor of the Government.*

Id. (emphasis added).

Plaintiffs filed a petition for rehearing and rehearing en banc on August 9, 2004. The Federal Circuit denied plaintiffs' petition on September 1, 2004. The Circuit's September 8, 2004 Mandate reversed this court's ruling but did not remand the case for further proceedings. We entered summary judgment for the Government on September 16. Plaintiffs moved for reconsideration on September 30.

ISSUES

Plaintiffs argue that the Federal Circuit has not heard their holiday pay claim, and that they are entitled to reopen the overtime claim because the Federal Circuit's decision on that issue created "a fundamental change in the law." Defendant contends that we do not have jurisdiction over plaintiffs'

holiday pay claim because the Federal Circuit's Mandate directed summary judgment for the Government. *See Engel Indus., Inc., v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) ("Unless remanded by this court, all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication.").

ARGUMENTS

We address the parties' arguments in some detail because of the uncertain status of this case on reconsideration. *See Glass v. United States*, 53 Fed. Cl. 33, 34 (2002) ("Where an appellate court's mandate may be uncertain, the trial court must adhere to both the letter and the spirit of the remand.") (citing *Engel*, 166 F.3d at 1383 (Fed. Cir. 1999)). Defendant argues that

> the appellate court resolved the issue of liability in the Government's favor, ordered summary judgment for the Government without limiting it to Count I, did not remand to this Court, and denied plaintiffs' petition for rehearing in which they expressly challenged the grant of summary judgment for the Government, [and therefore,] no issues remain for this Court's consideration.

Def.'s Resp. to Ct.'s Order of Dec. 29, 2004 at 2. Plaintiffs could have argued the holiday pay issue when they sought a rehearing before the Federal Circuit, according to the Government. Defendant asserts that plaintiffs knew they were arguing a ruling that disposed of their entire case, pointing to plaintiffs' petition to the Court of Appeals for rehearing. Plaintiffs argued in that petition that it was error "for the panel not only to reverse the grant of summary judgment for appellees, but then to *go further and order summary judgment for DOJ* . . . ." Pls.' Pet. for Reh'g at 12 (emphasis added).

Plaintiffs respond that they could not have raised the holiday pay issue as part of their request for rehearing

because that issue was not before the Circuit on interlocutory appeal. No one appealed the issue of whether they were entitled to holiday pay, so that question could not have been resolved against them, plaintiffs contend. *See Engel*, 166 F.3d at 1382. They complain that the Government would have this court enter summary judgment "as to a count in the Complaint that was never briefed by the parties, never addressed in the interlocutory order from which the appeal was taken, and never mentioned in the decision of the Court of Appeals . . . ." Pls.' Supp. Br. at 1. They seek an opportunity to be heard on Count Three of plaintiffs' Complaint, the claim for holiday pay.

Defendant replies that "the Government's motion for summary judgment was directed at liability with respect to the complaint as a whole." Def.'s Resp. to Ct.'s Order of Dec. 29, 2004 at 3. Therefore, this court's grant of summary judgment pursuant to the Mandate is dispositive of plaintiffs' case. *Id.* Plaintiffs argue that the mandate was directed narrowly at this court's overtime ruling because that was the only issue that we certified for interlocutory appeal.

DISCUSSION

The procedural issues in Laitram Corporation are similar to these. *Laitram Corp. v. NEC Corp.*, 115 F.3d 947 (Fed. Cir. 1997). The court in Laitram ruled that issues decided on appeal "by necessary implication" may not be reexamined on remand. 115 F.3d at 951 (citing *Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981)). The court added, "the law of the case doctrine did not operate to prevent the district court from considering . . . a meritorious issue never previously passed upon by it and never submitted to or decided by the appellate court . . . ." *Laitram*, 115 F.3d at 952 (citing *Conway*, 644 F.2d at 1062). Plaintiffs argue that the *Laitram* ruling describes the situation in their case. The holiday pay issue was "never previously passed upon by [this

court] and never submitted to or decided by the appellate court . . . ." *See id.*

The trial court in *Glass v. United States* ruled that "plaintiffs did not have direct party standing under [a] contract [with the Government], but . . . plaintiffs did have standing as third party beneficiaries." *Glass v. United States*, 53 Fed. Cl. 33, 34 (2002). The Government appealed the decision on third-party standing and the Federal Circuit reversed. *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001). On remand, the plaintiffs attempted to argue direct party standing. The trial court rejected that argument, finding that "the scope of the issue decided by the Federal Circuit was plaintiffs' standing under the contract, and therefore included plaintiffs' direct party status." *Glass*, 53 Fed. Cl. at 34. The Circuit's ruling on third-party beneficiary status necessarily included both theories, even though only the third-party beneficiary issue was appealed. *Id.* "Under the letter and the spirit of the Federal Circuit's decision, plaintiffs did not have standing under the contract, by any standard." *Id.* Having held that the plaintiffs were third-party beneficiaries, the appeals court necessarily held that they were not direct parties.

These cases frame the issues before this court on reconsideration. Did the Federal Circuit's decision on overtime pay also rule on holiday pay "by necessary implication." *See Laitram*, 115 F.3d at 952 (holding that "the law of the case doctrine applies only to those issues decided expressly or by necessary implication.") (citing *Conway*, 644 F.2d at 1062). That is, was the holiday pay claim within the scope of the issue decided by the Federal Circuit. *See Glass*, 53 Fed. Cl. at 34. Defendant contends that those issues were implicated in the Order appealed, and that plaintiffs are precluded from addressing issues that they could have raised then.

The Federal Circuit construes its own mandate. *See Laitram*, 115 F.3d at 950–51 (noting that the Supreme Court

construes its own mandate, and "logically, if the Supreme Court has plenary power to construe its own mandate, so must this court.") (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 40 L. Ed. 414, 16 S. Ct. 291 (1895)).

HOLIDAY PAY

The Federal Circuit ruled in *Doe* that knowledge, encouragement, and inducement by management or supervisory personnel do not authorize overtime pay. Overtime must be ordered or approved in writing. 372 F.3d at 1349. Holiday pay is a form of premium pay. *See* 5 U.S.C. § 5546. The statute suggests that employees are paid a premium for scheduled work that occurs on a Sunday or a holiday. Plaintiffs did not allege that they were scheduled for holiday work.[2]

Plaintiffs' allegations with regard to holiday pay are similar to those of overtime. The Complaint alleges that attorneys work on federal holidays "with the knowledge, encouragement, or inducement of DOJ management and supervisory personnel." Compl. ¶83. This is the same argument that plaintiffs presented in seeking overtime pay. The Federal Circuit rejected that argument. *See Doe*, 372 F. 3d at 1349.

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[2] Count Three of plaintiffs' Complaint contains the following allegations regarding holiday pay: That federal employees who perform work on a holiday are entitled to be paid at twice the employee's basic rate of pay pursuant to 5 U.S.C. § 5546; that nothing in section 5546 exempts attorneys from entitlement to holiday pay; that DOJ attorneys frequently work on federal holidays, with the knowledge, encouragement, or inducement of DOJ management and supervisory personnel; that it is the policy, pattern, or practice of DOJ not to compensate attorneys for work performed on federal holidays; that DOJ attorneys have not in fact been compensated for the vast majority of work actually performed on federal holidays; and that as a result, plaintiffs have been damaged financially by DOJ's refusal to provide holiday pay for hours worked on federal holidays.

Title 5 U.S.C. § 5546 authorizes pay for Sunday and holiday work.[3] Plaintiff's Complaint does not contain allegations concerning Sunday work. The first reference to holiday pay is in section 5546(b). This section provides that "an employee who performs work on a holiday . . . is entitled to . . . his basic pay, plus premium pay at a rate equal to the rate of his basic pay . . . ." An employee who works on a holiday is entitled to a minimum of two hours and a maximum of eight hours' double pay. *See* § 5546(b)(1), (c). Overtime work on a holiday is covered by the general overtime statute, section 5542(a). *See* § 5546(a), (d).

Section 5546 and related regulations apply to work that is "regularly scheduled," presumably to distinguish it from overtime work. Section 5546(a) provides premium pay for "regularly scheduled [work] . . . [,] a part of which is performed on Sunday . . . ." Authorization for holiday premium pay in the statute does not include the phrase "regularly scheduled," but the sections appear to follow the same statutory scheme. *See* § 5546(b). The premium for

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[3] Section 5546. Pay for Sunday and holiday work

. . . .

(b) An employee who performs work on a holiday ... is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—

(1) in excess of 8 hours; or

(2) overtime work as defined by section 5542(a) of this title.

(c) An employee who is required to perform any work on a designated holiday is entitled to pay for at least 2 hours of holiday work.

(d) An employee who performs overtime work as defined by section 5542(a) of this title on a Sunday or a designated holiday is entitled to pay for that overtime work in accordance with section 5542(a) of this title.

. . . .

holiday pay is double-time, limited to eight hours; Sunday pay is 125% of an employee's basic rate. *See* § 5546.

The Office of Personnel Management issues regulations defining terms used in section 5546 and other statutes governing Civil Service Regulations and Pay Administration in general. *See* 5 C.F.R. § 550. Definitions that apply to provisions for premium pay are listed at 5 C.F.R. § 550.103. The term "regularly scheduled work" is defined in that section as "work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with § 610.111 [Establishment of workweeks] . . . ." Holiday work means "nonovertime work performed by an employee during a *regularly scheduled* daily tour of duty on a holiday designated in accordance with § 610.202 of this chapter [Determining the holiday]." *Id.* (emphasis added).

Plaintiffs state that qualifications for holiday pay do not require that the work be "officially ordered or approved" as in the case of overtime pay. Holiday work is not subject to the ordered or approved standard of 5 U.S.C. § 5542, but the work must be "scheduled." Plaintiffs do not allege in their Complaint that attorneys were scheduled to work on holidays. The Federal Circuit's ruling eliminates the possibility that management or supervisory personnel could have scheduled holiday work through knowledge, encouragement, or inducement. *See Doe v. United States*, 372 F.3d 1347, 1351 (2004).

PLAINTIFFS' ALTERNATIVE ARGUMENTS

Plaintiffs contend that we should consider "alternative arguments" that the Federal Circuit did not address in its ruling on overtime pay, Count One of the Complaint. These arguments are that defendant improperly withheld written authorization for overtime compensation and "refused to institute a reasonable system for delegating the authority to order or approve overtime," and that "the Department of Justice could not unreasonably confine the delegation of

authority to order or approve overtime to high-level officials in Washington, D.C. . . . ." Pls.' Mot. Recons. at 3. However, decisions in the *Anderson* line of cases address such arguments, and those cases are overruled by *Doe*. 372 F.3d at 1357 ("We are compelled to hold that the Anderson line of cases is no longer good law . . . .") (referring to *Anderson v. United States*, 136 Ct. Cl. 365 (1956)); *see also Adams v. United States*, 162 Ct. Cl. 766, 768 (1963) (noting that the case before it was "controlled in principle by *Anderson* . . . ."). The *Adams* court added, "in the sense explained by *Anderson*, there was inducement of the plaintiffs . . . to perform overtime under the Federal Employees Pay Act . . . ." *Adams*, 162 Ct. Cl. at 768. *Adams* found that the appropriate Government officials "knew and approved of this overtime, and in effect authorized it." *Id.* at 769. "As in *Anderson*, written authorization or approval . . . was withheld as a matter of policy." *Id.*

The Federal Circuit held that overtime must be "officially ordered or approved in writing." *Doe*, 372 F.3d at 1349. The court did not add limitations to that requirement, as several of the *Anderson* cases had proposed. The appeals court ruled that "the written order requirement is not invalid on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute or because it is inequitable." *Id.* at 1357.

Finally, plaintiffs observe that,

> the decision at the end of the Federal Circuit's opinion states only that this Court's order granting summary judgment for plaintiffs and denying it for defendant is "REVERSED," and the mandate says the same thing. Neither the decision nor the mandate (nor the governing caselaw) prohibits plaintiffs from making additional arguments on remand.

Pls.' Mot. Recons. at 4 n.2. The decision and the Mandate do not specifically prohibit plaintiffs from making additional

arguments on remand, but neither do they suggest that we consider theories related to issues controlled by the Federal Circuit's ruling. Overtime must be ordered or approved by an authorized official in writing. *Doe*, 372 F.3d at 1349 ("Because the overtime here was not officially ordered or approved in writing as required by the [OPM] regulation, we hold that the plaintiffs were not entitled to compensation under FEPA . . . ."). This is the law of the case.[4]

CHANGE OF LAW

Plaintiffs argue that they should have an opportunity to make additional legal arguments based on the Federal Circuit's "dramatic departure from established precedent."

> The Federal Circuit's decision entirely changed the legal landscape, overturning fifty years of case law establishing the standard for liability under FEPA. Given the panel's dramatic departure from established precedent, plaintiffs are now permitted to raise new arguments supporting their claim that were not needed under the existing state of the law.

Pls.' Mot. Recons. at 4 (citing *Winters v. Gober*, 219 F. 3d 1375, 1379 (Fed. Cir. 2000); *Community for Creative Non-Violence v. Reid*, 270 U.S. App. D.C. 26, 846 F.2d 1485, 1496 n.14 (D. C. Cir. 1988)).

Plaintiffs cite *Winters* for the principle that "after a change in the law, 'fundamental principles of fairness' require that both the adversely affected party and the trial court be given an opportunity to conform their arguments and findings to the new legal standard." Pls.' Mot. Recons. at 4 (citing *Winters*, 219 F. 3d at 1379). *Winters* is a case from the Court of

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[4] "The law of the case is a judicially created doctrine, the purposes of which are to prevent the relitigation of issues that have been decided and to ensure that trial courts follow the decisions of appellate courts." *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991).

Appeals for Veterans Claims that the Federal Circuit remanded for consideration of a new standard that applied to the plaintiff's claim. The Circuit instructed the Veterans Claims court to return the case to an administrative agency to consider the newstandard in the first instance. Intervening precedent changed the standard by which Winters' case had been decided.

The court in *Community for Creative Non-Violence v. Reid* ruled that its adoption of an intervening "literal interpretation" standard of copyright law "so fundamentally changed the legal framework for this case" that it would entertain a theory that had not been argued at the trial level. 846 F.2d at 1496 n.14. The court did not decide the case, however, but remanded it to "accord Reid an opportunity to develop before the district court any factual or legal arguments he wishes to present . . . ." *Id.* (citing *Meehan v. Macy*, 138 U.S. App. D. C. 38, 425 F.2d 469, 472 (D.C. Cir. 1968) ("analyzing [the] nature and implications of [an] intervening Supreme Court decision but ordering remand to 'permit introduction of additional evidence and argument on points that have a significance . . . previously only dimly discerned.'")).

The *Reid* court remanded for the trial court to consider an intervening standard of copyright law adopted from a sister Circuit. The court in *Meehan* remanded a personnel case to the district court with instructions that it remand the case to the Civil Service Commission to allow the parties to argue the effect of an intervening Supreme Court decision. 425 F.2d at 472. The Federal Circuit remanded *Winters* for consideration of an intervening change in administrative law and case law.

These cases do not give this court the authority to hear new arguments on matters decided by the appeals court. The Supreme Court case cited as controlling by the Federal Circuit in *Doe* was not an intervening decision. *See Doe*, 372 F.3d at 1355 (citing *Schweiker v. Hansen*, 450 U.S. 785, 67 L. Ed. 2d 685, 101 S. Ct. 1468 (1981)).

CONCLUSION

The September 16, 2004 Order directing entry of summary judgment for the Government is supplemented as follows: The Federal Circuit's reasoning on interlocutory appeal of *Doe* controls plaintiffs' holiday pay arguments by necessary implication. The appeals court ruled that "knowledge, encouragement, or inducement" by supervisory personnel is not sufficient to authorize or approve overtime. This ruling applies with equal force to plaintiffs' holiday work claim. Holiday work must be "scheduled." The Complaint does not allege that members of the class were scheduled for holiday work. Plaintiffs' argument that they might have been induced by workload or otherwise to work on holidays is precluded by the law of the case doctrine. Plaintiffs' Motion for Reconsideration is DENIED.

/s/ Robert H. Hodges, Jr.
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-5075

JOHN DOE, on behalf of himself
and all others similarly situated,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

June 23, 2004, Decided

OPINION

DYK, *Circuit Judge*.

Department of Justice ("DOJ") attorneys brought a class action lawsuit in the Court of Federal Claims seeking overtime compensation. The *Federal Employees Pay Act* ("FEPA"), 5 U.S.C. § 5542 (2000), provides for such compensation only when overtime has been "officially ordered or approved." *Id.* § 5542(a). The relevant Office of Personnel Management ("OPM") regulation requires that overtime be officially "ordered or approved . . . in writing." 5 C.F.R. § 550.111(c) (2004). Because the overtime here was not officially ordered or approved in writing as required by the regulation, we hold that the plaintiffs were not entitled to compensation under FEPA; reverse the Court of Federal Claims' grant of summary judgment in the plaintiffs' favor, *see Doe v. United States*, 54 Fed. Cl. 404 (2002) ("*Doe I*"); and hold that summary judgment should have been granted in favor of the government.

BACKGROUND

The facts of this case are straightforward and uncontested. The plaintiffs (appellees in this court) are representatives of a class of more than nine thousand former and current DOJ attorneys who brought suit in the Court of Federal Claims in 1998, claiming compensation under FEPA for overtime work performed from 1992 to the date of a final judgment in this case. The Court of Federal Claims granted class certification in 1999. *Doe v. United States*, No. 98-896 C (Fed. Cl. Aug. 27, 1999) ("*Doe II*").[1]

Following discovery, the parties brought cross-motions for summary judgment on the issue of liability in 2000. The plaintiffs submitted a variety of documents on summary judgment in support of their claim that overtime was "officially ordered or approved." The plaintiffs submitted the deposition transcripts of former Assistant Attorney General Stephen R. Colgate, in which he confirmed "that component

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[1] In 1999 Congress enacted a statute prohibiting the payment of overtime compensation to attorneys in any division of the DOJ for work performed subsequent to the enactment of the legislation:

> None of the funds made available by this or any other Act may be used to pay premium pay under title 5, United States Code, sections 5542-5549, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> . . . Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1501, 1535, 1501A-21 (1999). Therefore, the relevant period for purposes of this litigation is 1992-1999.

heads expect their attorneys if necessary to put in the extra hours to get the job done," (J.A. at 538), and that "it has been the culture of the Department of Justice that attorneys are to put in the hours necessary to get the job done, and if that requires extra hours they are to put those hours in to get the job done," (J.A. at 539–40). The plaintiffs particularly emphasized excerpts from various editions of the United States Attorney's Manual spanning 1984 to 2000, which stated that "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." (J.A. 405–07, 410, 412; see also J.A. at 414, 416, 418.)[2]

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[2] The record also includes various internal DOJ memoranda summarizing the statutory and regulatory framework governing attorney overtime work, including: a 1980 memorandum from a Deputy Assistant Attorney General to an Associate Attorney General warning that "the court is likely to conclude that much overtime performed by attorneys, especially work required to meet short deadlines, has been 'induced,'" (J.A. at 424); a 1984 memorandum from an attorney in the Commercial Litigation Branch to [a] Deputy Assistant Attorney General stating, in "response to a request for an opinion as to whether attorneys are entitled to overtime pay . . . [that] an attorney employed by the Civil Division is entitled to overtime pay," (J.A. at 427, 432); a 1984 memorandum from the Deputy Director of the Office of Attorney Personnel Management to the Director, explaining that "the bottom line is that title 5 of the United States Code entitles DOJ attorneys . . . to overtime pay or compensatory time . . . for all overtime ordered, approved, or induced, if they request it" (J.A. at 433 (emphasis in the original)); and a 1984 memorandum written by the Interagency Attorney Personnel Group, explaining that "when the performance of overtime work is 'induced' by supervisors it is compensable, even if not 'ordered or approved,'" (J.A. at 448). The record also includes a 1994 memorandum from then Assistant Attorney General Stephen R. Colgate establishing a Working Group to formulate attorney overtime policy and his 1996 recommendations to the Attorney General based on the findings of this Working Group, stating that "attorneys are rarely *ordered or approved* to perform overtime work, [but are] frequently *expected* to, and do, . . . without extra compensation," (J.A. at 467 (emphasis in original)).

It was undisputed that at least some members of the class at some times worked more than a forty-hour workweek. The parties differed as to the interpretation of the statute and the interpretation and effect of the pertinent OPM regulation. FEPA generally mandates overtime compensation to federal employees in Grade 15 or below for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek." 5 U.S.C. § 5542(a). The government argued that the plaintiffs were not entitled to compensation because the pertinent regulation required that overtime be "ordered or approved . . . in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. § 550.111(c). The government maintained that the requirement of a writing was not satisfied. The plaintiffs contended that "because [the DOJ] expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, they have authorized and approved the overtime under 5 U.S.C. § 5542." (Compl. at ¶65.)

The Court of Federal Claims held in favor of the plaintiffs, granting the plaintiffs' summary judgment motion and denying the government's motion. *Doe I*, 54 Fed. Cl. at 418. The Court of Federal Claims found that "no plaintiff in the Class has requested overtime, and it follows that no authorized official could have ordered or approved it" in writing. *Id.* at 409. The court further explained that the "plaintiffs do not allege that they were explicitly ordered to work overtime by an authorized official, but that management's expectations and their caseloads require work in excess of forty hours a week to complete [sic] satisfactorily." *Id.* at 406. The court recognized that until the 1956 decision in *Anderson v. United States*, 136 Ct. Cl. 365 (1956), our predecessor court, the Court of Claims, had strictly enforced the OPM regulation's requirement that an order or approval for overtime be made in writing. However, the court concluded that the Court of Claims adopted "a more equitable

approach in recent years," *Doe I*, 54 Fed. Cl. at 407, and that "the phrase 'ordered or approved' as used in the pay statutes became subject to broader interpretations, including inducement, encouragement, and perhaps expectation." *Id.* at 410. The court concluded that official inducement suffices to warrant compensation and that there was extensive documentation in the record establishing such inducement:

> The Department of Justice informed attorneys that it expected them to work overtime when necessary. Authorized department officials testified that they understood the job to require overtime work. The Department's Manual states that attorneys should expect to work in excess of regular hours. These factors, along with management's understanding and approval of the process show that Department officials moved . . . into the area of "inducement."

Id. at 416 (citing *Byrnes v. United States*, 163 Ct. Cl. 167, 330 F.2d 986 (Ct. Cl. 1963)). Finding that the "official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it," *id.*, the Court of Federal Claims held that because all such overtime was induced the "class members are entitled to overtime pay if they can meet the standards of proof required by law," *id.* at 405.

The Court of Federal Claims certified its summary judgment order for interlocutory appeal on the ground that "judicial economy will be served by seeking appellate review of this court's liability determination before we address damages." *Doe II*, No. 98-896 C, slip op. at 1. The government timely petitioned our court for permission to take an interlocutory appeal. We granted this petition and have jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(d)(2). *Doe v. United States*, 67 Fed. Appx. 596 (Fed. Cir. Apr. 2, 2003).

DISCUSSION

"We review the Court of Federal Claims' grant of summary judgment without deference." *Agwiak v. United States*, 347 F. 3d 1375, 1377 (Fed. Cir. 2003).

I

FEPA was first enacted in 1945. Federal Employees Pay Act of 1945, ch. 212, 59 Stat. 295 (initially codified at 5 U.S.C. § 911; re-codified as amended at 5 U.S.C. § 5542). In its present form, the Act provides:

> For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . at [the rates provided in 5 U.S.C. § 5542(a)(1)-(5)].

5 U.S.C. § 5542(a). This overtime requirement applies only to employees in Grade 15 or below, and an employee may not receive overtime if such payment would increase the employee's aggregate compensation in excess of the maximum allowable rate for Grade 15 employees. *Id.* § 5547. FEPA allows the head of an agency to "grant [an] employee compensatory time off from his scheduled tour of duty instead of payment under section 5542." *Id.* § 5543(a)(1). The head of an agency also may, with the approval of OPM, grant annual premium pay of up to twenty-five percent instead of overtime compensation when "an employee [is] in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty." *Id.* § 5545(c)(2).

FEPA expressly delegated rulemaking authority to the then Civil Service Commission, providing that "the Civil Service Commission is hereby authorized to issue such regulations . . . as may be necessary for the administration of the foregoing provisions of this Act." § 605, 59 Stat. at 304. Shortly after the Act was passed, the Civil Service Commission adopted an implementing regulation. *See* 10 Fed. Reg. 8,191, 8,194 (July 4, 1945). The Civil Service Commission was supplanted by OPM in 1978, which has since been responsible for FEPA regulations under identical statutory language. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), 92 Stat. 1111, 1224; *see also* 5 U.S.C. § 5548.[3] Substantially the same regulation has applied from 1945 to the present. The current regulation provides:

> Authorization of overtime pay.
>
> . . .
>
> (C) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. § 550.111 (emphasis added). For convenience, we refer to the regulation as the "OPM regulation."

II

Beginning in the 1950s and ending in the 1970s, our predecessor court, the Court of Claims, repeatedly had occasion to consider FEPA and its accompanying regulations. Curiously, we have not had occasion to interpret the overtime

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[3] The current statute states: "The Office of Personnel Management may prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter . . . insofar as this subchapter affects employees in or under an Executive agency." 5 U.S.C. § 5548(a).

provision of the statute or regulations in published opinions since that time.

In these Court of Claims cases, the government persistently argued that the OPM regulation did not permit overtime compensation unless an authorized official ordered or approved the overtime work in writing. As the Court of Federal Claims correctly noted here, the Court of Claims' early decisions agreed with the government, maintaining a strict interpretation of the statute and regulation to require prior official written authorization. In *Post v. United States*, 121 Ct. Cl. 94 (1951), the court in dictum described the OPM writing regulation as "a necessary safeguard against subjecting the Government to improper expense." *Id.* at 99. Soon thereafter in *Tabbutt v. United States*, 121 Ct. Cl. 495 (1952), the Court of Claims rejected a claim to overtime compensation brought by investigators who based their claim on the fact that their supervisors approved daily work records that reflected overtime. The court held that the supervisors' approval of these daily reports "could hardly be said to take the place of an order for these men to work overtime, or of an approval of their claim to compensation for having done so." *Id.* at 505.

The Court of Claims' insistence on written authorization or approval climaxed in *Gaines v. United States*, 132 Ct. Cl. 408, 131 F. Supp. 925 (Ct. Cl. 1955), where it rejected a FEPA overtime claim. The plaintiff in *Gaines* worked for the Civil Aeronautics Administration in a position that "required a considerable amount of travel," and he claimed that "he was required to be on official duty in excess of the prescribed 40-hour work week." *Id.* at 926–27. The court discussed FEPA and the pertinent regulation, and it explained that "any claim [for overtime under FEPA] must be based upon the performance of overtime services which were expressly authorized or approved in writing by an officer or employee to whom such authority has been specifically delegated." *Id.*

at 927. Finding no such authorization, and relying on *Post* and *Tabbut*, the court entered summary judgment in favor of the government, stating: "absent the written authorization or approval as required by the statute and regulation, plaintiff is not entitled to recover." *Id.*; see also *Gray v. United States*, 136 Ct. Cl. 312, 313, 317 (1956) (dismissing plaintiff's FEPA overtime claim, which argued entitlement to compensation because authorized supervisors reviewed overtime work records and were aware of his overtime hours, "on the authority of *Tabbut*, . . . *Post* . . . and *Gaines*" because the official authorized to approve overtime "did not at any time officially approve or order in writing any agent to work overtime").

The Court of Claims' 1956 decision in *Anderson*, 136 Ct. Cl. 365, took a dramatically different approach to the OPM regulation's written order requirement. In *Anderson*, no "overtime in excess of the administrative workweek was ordered or approved in writing" as required by the OPM regulation. *Id.* at 393. Indeed, "in withholding written orders for or approval of the overtime, [the Agency's authorized officials] intended to withhold compensation for the services performed." *Id.* at 370. The court concluded that the substantive purpose of FEPA was to ensure compensation for officially ordered or approved overtime work; that the regulation's procedural writing requirement could not be used to subvert the intent of the Act; and that the government could not refuse to pay compensation if it had orally "induced" its employees to work overtime. *Id.* at 371. It was "not disputed" that the plaintiffs worked beyond the forty-hour FEPA workweek and that the work of the Customs and Border Patrol agents involved "was not the kind of work which could be easily accommodated to a 5-day, 40-hour week." *Id.* at 367–68. According to the court:

> The failure of the Commissioner of Customs to translate the 40-hour week into administrative reality for the

> patrol inspectors, and his suggestion of "voluntary" overtime to the district superintendents and their subordinate supervisory officials, together with his knowledge of the use made by them in rationalizing the extension of "voluntary" overtime, afford ample evidence of approval of the overtime worked by the plaintiffs by an official with authority under the statute and the regulations to give such approval.

Id. at 370. Because "the writing was required by the regulations, not by the statute" and because "the withholding of written orders or approval reflected observance of the letter of the regulation but denial of the substance of the statute," it could not protect the government against FEPA liability. *Id.* at 370–71. According to the court, FEPA's "mandate to pay additional compensation for overtime hours, when the work was, as here, officially ordered or approved" overrides the regulation's procedural requirement. *Id.* at 371.

Anderson ushered in a series of cases where the court, following *Anderson*, awarded FEPA compensation for overtime induced by government officials even though there was no written order or written approval. These cases embraced *Anderson's* reasoning that the Civil Service Commission was without authority to attach procedural limitations to the substantive policy of FEPA. *See, e.g.*, *Fix v. United States*, 177 Ct. Cl. 369, 368 F.2d 609, 613 (Ct. Cl. 1966) (holding that the statute entitles an employee to compensation if "induced or required" to work overtime and that "if the regulations attempt to lay down any other rule, they cannot stand since they would then be plainly inconsistent with the governing pay legislation as we have construed it"); *Rapp v. United States*, 167 Ct. Cl. 852, 340 F.2d 635, 641 (Ct. Cl. 1964) (holding that the government's contention in denying overtime compensation "runs counter to the Federal Employees Pay Act of 1945" because, as *Anderson* stated, "the mandate to pay additional compensation for overtime

hours, when the work was, as here, officially ordered or approved, is overriding" (quoting *Anderson*, 136 Ct. Cl. at 371)); *Adams v. United States*, 162 Ct. Cl. 766, 781 (1963) (relying on *Anderson's* theory that in circumstances where overtime work has been orally induced, "the mandate of the statute overrides the lack of written authorization or approval"). Therefore, as the plaintiffs here urge, these cases held the writing requirement invalid as inconsistent with the purpose of FEPA because it added a procedural requirement that was not reflected in the statute. [RB at 52].

To some extent, these cases also suggested that equitable considerations prevented the government from denying overtime compensation where it "induced" overtime work. See *Baylor v. United States*, 198 Ct. Cl. 331, 360 (1972) ("To allow defendant to avoid payment of overtime compensation because it chose to require overtime indirectly rather than directly would obviously be inequitable."); *Adams*, 162 Ct. Cl. at 784 (explaining that denying recovery for induced overtime would permit "the officials of the Department of Justice [to] commit[] a wrong" for which their employees "would be without remedy" and that "the inequity of such a result is manifest"); see also *McQuown v. United States*, 199 Ct. Cl. 858, 866 (1972) (congressional reference opinion by a review panel of commissioners of the Court of Claims, holding that the plaintiff "was induced and coerced by his supervisors . . . with the knowledge and approval of officials authorized to approve overtime work, . . . thereby estopping the defendant from relying on the provisions that overtime must be officially ordered or approved in writing").

III

Court of Claims decisions are, of course, binding upon us unless undermined by intervening Supreme Court or en banc authority. *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1373 (Fed. Cir. 2000) (citing *Tex. Am. Oil Corp. v. United States Dep't of Energy*, 44 F.3d 1557, 1561 (Fed.

Cir. 1995) (en banc)); see also *S. Corp. v. United States*, 690 F.2d 1368, 1370–71 (Fed. Cir. 1982) (en banc). The problem is that the Court of Claims decisions discussed in the preceding section are not consistent with each other. The Court of Federal Claims aptly observed here that "an employee seeking overtime can likely find an opinion of [the Court of Claims] that fits his situation regardless of what it may be." *Doe I*, 54 Fed. Cl. at 410 (quoting *Anderson v. United States*, 201 Ct. Cl. 660 at 675 (Skelton, J., dissenting)). The plaintiffs argue that we should continue to reject the writing requirement as did our predecessor court in the more recent *Anderson* line of cases. The government urges that we follow *Gaines* and the earlier cases that strictly enforced the written order requirement on the theory that under the principle of stare decisis, "the *Anderson* panel had no more authority to 'discard' prior cases than any other panel." (Reply Br. for the Appellant at 17.) In this respect we agree with the plaintiffs. When the Court of Claims sat en banc, as it typically did in the Anderson line of cases, we are obligated to follow the court's most recent decision because an en banc court may modify or effectively overrule its earlier decisions. *See George E. Warren Corp. v. United States*, 341 F.3d 1348, 1351–52 (Fed. Cir. 2003).

Alternatively, the government urges that the opinions in the *Anderson* line of inducement cases were all decided before the Supreme Court's decision in *Schweiker v. Hansen*, 450 U.S. 785, 67 L. Ed. 2d 685, 101 S. Ct. 1468 (1981), and that *Hansen* effectively overruled these cases. We agree. In holding that the OPM regulation was invalid because it added a procedural writing requirement to the substantive requirements of FEPA or because the result was inequitable, the *Anderson* line of cases is inconsistent with *Hansen.*

Hansen involved the *Social Security Act*, which extended benefits to a person who "has filed application." 42 U.S.C. § 402(g)(1)(D) (1976). Benefits could be paid retroactively

for the twelve months prior to the filing of an application. *Id.* § 402(j)(1). The regulations promulgated pursuant to the Social Security Act required the application to be in writing, 20 C.F.R. § 404.602 (1974), and the Social Security manual required administrators to inform applicants that their applications must be filed in writing, *Hansen*, 450 U.S. at 786. When the plaintiff orally applied for benefits, the Social Security administrator erroneously informed her that she was not entitled to benefits and, in violation of the manual, failed to inform the plaintiff that the regulations required her to file a written application. *Id.* The plaintiff subsequently learned that she was entitled to benefits, and she filed a written application, including a claim for retroactive benefits for the twelve months prior to her oral application. *Id.* at 786–87. This claim was denied. While the facts of *Hansen* were substantially similar to those in the *Anderson* line of cases, the plaintiff's challenge to the writing requirement in *Hansen* was more limited. Rather than suggesting that the writing requirement was entirely invalid, the plaintiff urged that the regulation was entitled to less respect than the substantive policies of the statute and that the agency could therefore be estopped from relying on the regulation's writing requirement.

The Second Circuit held in favor of the plaintiff, and the Supreme Court described this decision in language that echoed the *Anderson* line of cases: "[the Second Circuit] considered the [regulation's] written-application requirement a mere 'procedural requirement' of lesser import than the fact that [the plaintiff] . . . had been 'substantively eligible' for the benefits" under the statute. *Id.* at 787. The Court concluded:

> *[The Second Circuit's] majority's distinction between [the plaintiff's] "substantive eligibility" and her failure to satisfy a "procedural requirement" does not justify estopping petitioner in this case.* Congress expressly

> provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of application. *A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.*

Id. at 790 (emphases added) (third and fourth alterations in original). In so holding, the Supreme Court necessarily concluded that the writing requirement was not invalid simply because it added an additional procedural requirement to the substantive requirements of the statute. This result is directly at odds with the *Anderson* line of cases.

After *Hansen, in Boulez v. Commissioner*, 258 U.S. App. D.C. 90, 810 F.2d 209 (D.C. Cir. 1987), the District of Columbia Circuit sustained a Treasury regulation's addition of a writing requirement to the Internal Revenue Code's provision regarding compromise agreements with the Internal Revenue Service. *Id.* at 212–13. The court quoted the Supreme Court's earlier instruction that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury," *id.* at 218 n.68 (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385, 92 L. Ed. 10, 68 S. Ct. 1 (1947)), and it explained that *Hansen* taught that this "principle is no different where the requirement is promulgated by the agency charged by Congress with administering a statute," *Boulez*, 810 F.2d at 218 n.68 (citing *Hansen*, 450 U.S. 785, 67 L. Ed. 2d 685, 101 S. Ct. 1468); see also *Am. Airlines, Inc. v. Austin*, 75 F.3d 1535, 1541–42 (Fed. Cir. 1996). The court further elaborated on *Hansen's* reasoning, explaining that the Supreme Court held that "no distinction between substantive and procedural requirements suffices to mitigate the court's responsibility to ensure observance of regulations governing claims on the public fisc." *Id.* (citing *Hansen*, 450 U.S. at 790).

The *Anderson* line of cases fares no better if it is viewed as resting on "equitable" considerations. *Hansen* directly held that such considerations could not impose liability on the government, 450 U.S. at 790, a result reinforced in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990). The plaintiff in *Richmond*, a recipient of federal disability annuity, was given an outdated publication in 1986 that incorrectly advised him that he could work without forfeiting his disability payments. 496 U.S. at 417–18. The plaintiff's disability payments were terminated once he began working. He argued that the government was estopped from terminating his benefits because it gave him incorrect advice. *Id.* at 418. The Court stated that "all parties here agree that the award [the plaintiff] seeks would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest." *Id.* at 424. Relying on *Hansen*, the Court rejected the plaintiff's estoppel claim because "the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized." *Id.* at 426, 429. While *Richmond* addressed a statutory limitation, the opinion cited *Hansen* in support of its holding, which treated statutory and regulatory requirements concerning the payment of money from the Treasury as equally binding. *Id.* at 429. Expressly following *Hansen* and *Richmond*, our court held in *Koyen v. Office of Personnel Management*, 973 F.2d 919 (Fed. Cir. 1992), that "the Supreme Court has left no doubt that it is 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id.* at 922–23 (quoting *Hansen*, 450 U.S. at 788). We therefore denied compensation "despite the equities" in favor of compensation because "we were bound by the dictates of *Richmond*." *Id.* at 923.

Thus, to the extent that the *Anderson* line of Court of Claims cases held that the Civil Service Commission was without authority to impose a "procedural" written order requirement because it restricted the substantive scope of the

overtime statute or because of equitable considerations, they are inconsistent with *Hansen* and *Richmond*. In light of *Hansen* and *Richmond*, we are compelled to hold that the *Anderson* line of cases is no longer good law and that the written order requirement is not invalid on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute or because it is inequitable. *See Bankers Trust*, 225 F.3d at 1373. We address below the plaintiffs' arguments that the writing requirement is invalid under the statute for other reasons.

A

The plaintiffs assert that the writing requirement is only "an administrative direction to employing agencies concerning procedures for administering overtime—not an attempt to limit the statutory pay entitlement Congress had enacted for federal employees." (Br. for Appellees at 32.) The plaintiffs argue that FEPA itself limits OPM's role to that of establishing merely administrative regulations.

Although there are some situations in which a statutory or regulatory requirement is purely an administrative directive that is not enforceable in litigation,[4] the OPM regulation here is not such a regulation. FEPA provides that "the Office of Personnel Management may prescribe regulations . . . necessary for the administration of this subchapter." 5 U.S.C. § 5548(a) (emphasis added). We held in *Contreras v. United States*, 215 F.3d 1267 (Fed. Cir. 2000), that the *Annual and Sick Leave Act of 1951*, 5 U.S.C. §§ 6301–6387, in which

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[4] See, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159, 154 L. Ed. 2d 653, 123 S. Ct. 748 (2003) (holding that where a statute requires an agency to take certain action by a specific date, "if [the] statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction" (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993)).

"Congress authorized OPM to issue regulations 'necessary for the administration'" of the Act, allows OPM to "fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program." *Id.* at 1274 (quoting 5 U.S.C. § 6311). We see no reason why FEPA's similarly phrased mandate to OPM should be interpreted any differently. OPM was not limited by the statute to promulgating merely administrative directives, but was empowered to issue regulations setting forth substantive requirements.

In fact, Congress relied heavily on the Civil Service Commission, OPM's predecessor, to promulgate substantive standards for overtime statutes even before the passage of FEPA. For example, in the War Overtime Pay Act of 1943, ch. 93, 57 Stat. 75, Congress invested the Civil Service Commission with the power "to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration" of the overtime statute. *Id.* § 9, 57 Stat. at 77. Although the Act itself entitled federal employees to overtime compensation without any reference to the procedure for authorizing overtime work, the Civil Service Commission's regulations limited the authority to order overtime to "officers or employees to whom such authority has been specifically delegated by the head of the department or agency." 5 C.F.R. § 20.9 (1943 Supp.). Congress incorporated the substance of the Civil Service Commission's standard in FEPA, thus suggesting approval of the Civil Service Commission's broad exercise of its rulemaking power.

Contrary to the plaintiffs' claim, we also note that OPM did not intend in the regulation to establish a mere administrative instruction. The OPM regulation was clearly designed to interpret or expound upon the FEPA's "officially ordered or approved" requirement, 5 U.S.C. § 5542(a). This intention is highlighted by the regulation's usage of parallel

language: "Overtime work. . . may be ordered or approved only in writing," 5 C.F.R. § 550.111(c). None of the prior cases has suggested that the regulation should be interpreted as a mere administrative instruction.

B

We next consider whether OPM's regulation is entitled to *Chevron* deference, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *Chevron* contemplates a two-step analytic process. *Id.* at 842. First, we ask "whether Congress has directly spoken to the precise question at issue"; if so, we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If, however, the statute is ambiguous, we proceed to *Chevron* step two: "whether the agency responsible for filling a gap in the statute has rendered an interpretation that 'is based on a permissible construction of the statute.'" *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346 (Fed. Cir. 2001) (quoting *Chevron*, 467 U.S. at 843).

The first step of the *Chevron* analysis here centers on the phrase "ordered or approved." FEPA does not specify the form in which overtime must be "ordered or approved," and these words are ambiguous as to whetherthey refer to written or oral authorization or both. Dictionaries at the time FEPA was enacted in 1945 make clear that the term "order" may refer to either a written or oral direction. *See* VII *A New English Dictionary on Historical Principles* 183 (1st ed. 1909) [the second edition of which is known as the Oxford English Dictionary] ("23. An authoritative direction, injunction, mandate; a command, oral or written; an instruction."); *see also Webster's New International Dictionary* 1716 (2d ed. 1939) ("3. To give an order to; to command"). So too, modern dictionaries make clear that an order may refer to either an oral or written order. *See* X *The Oxford English Dictionary* 905 (2d ed. 2004) ("23. a. An authoritative

direction, injunction, mandate; a command, oral or written; an instruction."); *Webster's Third New International Dictionary* 1587–88 (2002) (providing various definitions for an "order," including "a formal written authorization to deliver materials, to perform work, or to do both"). The term "approve" is broad enough to connote an oral or written approval. *See* I *A New English Dictionary on Historical Principles* 416 (1st ed. 1888) ("5. to confirm authoritatively; to sanction."); *Webster's New International Dictionary* 133 ("3. To sanction officially; to ratify; to confirm"); *see also Webster's Third New International Dictionary* 106 ("5a: to express often formally agreement with and support of or commendation of as meeting a standard"). Since the statutory terms "order" and "approve" are broad enough to encompass either written or oral communications (or both), these terms are ambiguous. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741–742, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996); *see also, Boulez*, 810 F.2d at 212 ("Section 7122(a) is facially ambiguous. It does not specify that compromise agreements must be in writing, nor does it explicitly sanction oral settlements."). There is no suggestion here that this ambiguity may be resolved by resort to FEPA's legislative history or by other traditional tools of statutory construction. Clearly, the first *Chevron* requirement—ambiguity—is present.

We then turn to the second *Chevron* analytic step. The Supreme Court has recognized that "a very good indicator" of the applicability of "*Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings." *United States v. Mead Corp.*, 533 U.S. 218, 229, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001); *see also Pesquera MaresAustrales v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). The OPM regulation, adopted "by virtue of the authority vested in the U.S. [sic] Civil Service Commission by section 605 of the Federal Employees Pay Act of 1945,"

Exec. Order No. 9,578, 10 Fed. Reg. 8,191 (July 4, 1945), has the necessary degree of formality to warrant *Chevron* deference. Under *Chevron*, if a statutory term "is ambiguous, the [agency's] regulation implementing [it] 'is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 158 L. Ed. 2d 450, 124 S. Ct. 1741, 1748 (2004) (quoting *Mead Corp.*, 533 U.S. at 227). We have said that the party contesting the regulation "bears the burden of showing that the agency's approach is arbitrary or otherwise unreasonable." *Koyo Seiko Co.*, 258 F.3d at 1347. The plaintiffs here have not met this burden with respect to OPM's regulation.

The plaintiffs argue that the OPM regulation is an unreasonable interpretation of FEPA that is not entitled to *Chevron* deference, relying on the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 152 L. Ed. 2d 167, 122 S. Ct. 1155 (2002), because the regulation's addition of a writing requirement is contrary to FEPA. In *Ragsdale*, the Supreme Court held invalid a regulation under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (2000), which allowed monetary recovery for an employer's technical violation of the regulation without a showing of the prejudice to the employee. 535 U.S. at 84, 88. The statute, however, expressly required an employee to show actual prejudice from an employer's actions as a prerequisite to compensation. *Id.* at 89. The Supreme Court held that "[a] regulation cannot stand if it is . . . manifestly contrary to the statute." *Id.* at 86 (quoting *United States v. O'Hagan*, 521 U.S. 642, 673, 138 L. Ed. 2d 724, 117 S. Ct. 2199 (1997)) (internal quotation marks omitted). Likewise, in *Brown v. Gardner*, 513 U.S. 115, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994), the Supreme Court invalidated a Department of Veterans Affairs regulation that required veterans to prove negligence on the part of the Veterans Administration in order to recover certain

benefits that the statute mandated simply upon proof of injury. *Id.* at 120.[5]

These Supreme Court decisions do not help the plaintiffs in the present case because the OPM regulation's written order requirement does not contradict the language of FEPA. FEPA merely limits compensation to those employees whose overtime work has been "officially ordered or approved." 5 U.S.C. § 5542(a). This statement in and of itself is not at odds with the regulation's writing requirement, nor does it suggest that inducement is sufficient to constitute official order or approval. And the Act clearly contemplated that overtime would be "ordered or approved" through a somewhat formal procedure by providing an exception where such procedure is impossible. Where formal control is impractical, such as if "an employee [is] in a position in which the hours of duty cannot be controlled administratively" and "requires substantial amounts of irregular, unscheduled overtime duty," FEPA allows the employee to "receive premium pay for this duty on an annual basis . . . [at] an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position." 5 U.S.C. § 5545(c)(2).

Significantly too, the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C.

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[5] The plaintiffs also cite two of this court's cases holding that regulations that are inconsistent with statutes are invalid. *See Torres v. Office of Pers. Mgmt.*, 124 F.3d 1287, 1289–90 (Fed. Cir. 1997) (invalidating an OPM regulation that required an employee to have worked at least 30 days in a particular agency before qualifying for early retirement because it was "contrary to the clear intent" of the statute, which "clearly and plainly delegated only . . . very specific limited tasks to OPM" to determine "where in the country the early retirement offer would be made, not when in time"); *Horner v. Hollander*, 895 F.2d 759, 760–61 (Fed. Cir. 1990) (invalidating an OPM regulation because it "ran counter to the plain meaning of the language" of the statute at issue because retirement eligibility under the statute "cannot reasonably be limited to" the class defined in the regulation).

§§ 201–219) ("FLSA"), enacted before FEPA, incorporated a different standard for overtime compensation that allowed recovery for inducement. Under FLSA, an employee is entitled to overtime pay if the employer "suffers or permits" the employee to work overtime.[6] 29 U.S.C. § 203(g); see also 29 C.F.R. § 785.11 (2003).[7] The Supreme Court has repeatedly emphasized the expansive nature of this particular language, stating that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362, 89 L. Ed. 301, 65 S. Ct. 295 (1945); *see also, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 300 n.21, 85 L. Ed. 2d 278, 105 S. Ct. 1953 (1985). Our sister circuits have interpreted this standard as requiring only that an employer "knows or has reason to believe the employee is continuing to work and the duties are an integral and indispensable part of the employee's principal work activity." *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) (internal quotation marks and citations omitted); *see also, e.g., Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1133 (10th Cir. 2000); *Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516, 524 (2d

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[6] In 1974 the FLSA was applied to federal employees, Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 58 (codified as amended at 29 U.S.C. § 203). The FLSA, however, exempts "employee[s] employed in a . . . professional capacity" from its purview, and the attorneys here involved were not covered by the FLSA because they fell under this professional exemption. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.3(a)(1).

[7] "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time." 29 C.F.R. § 785.11.

Cir. 1998); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995); *Reich v. Dep't of Conservation and Natural Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994); *Forrester v. Roth's I. G. A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). The lack of such language in FEPA at least suggests that the Act's requirement that overtime be "officially ordered or approved," 5 U.S.C. § 5542(a), cannot be satisfied by merely "suffering or permitting," 29 U.S.C. § 203(g), overtime. This further supports OPM's view that FEPA's "ordered or approved" language can reasonably be interpreted to require a more formal means of authorization.

The writing requirement also serves an important purpose of the statute—to control the government's liability for overtime. This purpose is discussed in the Act's legislative history. During the 1945 hearings before the House Committee on the Civil Service regarding FEPA, a Commissioner of the Civil Service Commission, Arthur Flemming, testified on behalf of the government in support of the proposed legislation, including the overtime provision. Commissioner Flemming's testimony suggested that FEPA had the dual purpose of ensuring that employees received overtime compensation while adequately controlling the government's obligation to pay overtime so as not to subject the Treasury to unanticipated liabilities. *Salary and Wage Administration in the Federal Service: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service*, 79th Cong. 42 (1945). Commissioner Flemming described FEPA's provisions, including the overtime pay provision, explaining its benefits:

> Looking at it from the standpoint of government, as an employer, . . . if adequate controls are maintained over appropriations, the extra expense involved in overtime will discourage its use, and, in the long run, encourage better management.

Id. Representatives repeatedly questioned Commissioner Flemming on the oversight mechanisms included in the

proposed legislation that would control the distribution of overtime pay. Representative Miller, for example, stated that "the final check . . . is the money that will have to be very definitely set up in the budgets of the departments for overtime pay," and Representative Vursell communicated that he was "fearful that you [*i.e.*, Commissioner Flemming as the government's champion of the overtime provision] don't have that check." *Id.* at 51. Representative Miller elaborated on Congress' concern that there be adequate controls on the payment of overtime compensation: "if I am a $6,000 executive I just can't come in the morning and say, 'I decided to stay at the office last night for 2 hours and, therefore, I want $1.75 an hour.'" *Id.* Commissioner Flemming responded to these concerns, explaining:

> The proposed section states that they get additional compensation for all hours of employment officially ordered or approved in excess of 40 hours. And, speaking now for my own agency, I know that the regulations under which overtime is ordered and compensated for are very strict, and in most instances requests for approval have to come all the way to the top.

Id.

Finally, deference is particularly warranted in this case because OPM's regulation was enacted almost contemporaneously with the statute. *See Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477, 59 L. Ed. 2d 519, 99 S. Ct. 1304 (1979); *Baird v. Sonnek*, 944 F. 2d 890, 894 (Fed. Cir. 1991).

In summary, we find that the OPM regulation interprets an ambiguous statute that it was expressly authorized to administer. OPM's construction of the phrase "ordered or approved," as requiring written authorization, is reasonable and entitled to Chevron deference because it comports with, and indeed furthers, the language and purpose of FEPA.

IV

This leads to the question whether the writing requirement was satisfied in this case. The plaintiffs contend that the written order requirement was satisfied here, citing a wide variety of writings that allegedly ordered and approved overtime work. These writings include a 1996 memorandum from former Assistant Attorney General Colgate, a pamphlet from the Office of the Attorney General entitled "General Office Information," an administrative bulletin from the Environmental and Natural Resources Division entitled "Professional Timekeeping," an Environmental and Natural Resources Division 1998 manual entitled "Case Management Policy and Procedures Manual," a 1996 document from the Case Management Staff of the Executive Office for United States Attorneys entitled "Overview of the United States Attorneys' Monthly Resource Summary Report," and the United States Attorneys' Manual (the "Manual"). There are two problems with these writings.

First, the vast majority of the writings cited by the plaintiffs were not written by officials with proper delegated authority to "officially order[] or approve[]," 5 U.S.C. § 5542(a), overtime. Just as the terms "ordered" and "approved" are ambiguous, so too the term "officially" is ambiguous. *See Reno v. Koray*, 515 U.S. 50, 60–61, 132 L. Ed. 2d 46, 115 S. Ct. 2021 (1995) (recognizing that the term "officially" in the statutory phrase "officially detained" was ambiguous). Under *Chevron*, OPM was authorized to define the term "officially" in the regulations. The OPM regulation explains that an order or approval is only official if made "by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. § 550.111(c). The plaintiffs appear again to urge that this regulatory requirement is either merely an administrative instruction or invalid. We reject these contentions with respect to this portion of the regulation just as we have rejected these contentions with

respect to the written order requirement. Indeed, one of the more recent Court of Claims cases addressing this issue held that overtime must be authorized by "an officer or employee to whom this authority has been specifically delegated" as required by the OPM regulation, 5 C.F.R. § 550.111(c), and it denied compensation because the plaintiffs were not instructed to work overtime by "officials designated by the regulation to authorize overtime." *Bilello v. United States*, 174 Ct. Cl. 1253, 1257 (1966).

While the Court of Federal Claims indicated that the "parties agree that former Assistant Attorney General Colgate was the only person who had authority to order or approve overtime for the entire Class," *Doe I*, 54 Fed. Cl. at 414; *see also* 28 C.F.R. § 0.145 (2003), the plaintiffs in this court appear to assert that "the Attorney General, the Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for Administration all had authority to authorize overtime work." (Br. for Appellees at 15.) Assuming that the plaintiffs are correct on this point, the majority of the orders or approvals they cite were not made by officials on this list.

Second, even those writings that were arguably issued by officials who were arguably authorized to order overtime are not orders or approvals within the meaning of the statute and regulation. The plaintiffs argue in particular that the Manual, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ which is binding on Assistant United States Attorneys as well as all attorneys in the DOJ's litigation division, 28 C.F.R. § 0.22(b), satisfied the writing requirement. Because the Manual was prepared by the Executive Office for United States Attorneys under the supervision of the Attorney General and the direction of the Deputy Attorney General, *see* United States Attorneys' Manual, § 1-1.200, the plaintiffs contend that it constituted an official order to work overtime from the Attorney General. Assuming, without de-

ciding, that the Manual constitutes a written statement of the Attorney General, the Manual still does not provide the requisite writing. The Manual does not order attorneys to work any amount of overtime—it does not even, as the plaintiffs contend, order an indefinite number of overtime hours. The plaintiffs correctly quote the Manual as stating that:

> United States Attorneys are NOT authorized to approve overtime premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.

Id. § 3-4.550. However, this statement instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime. The Manual repeatedly emphasizes the following two directives: "overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so" and "U.S. Attorneys are not authorized to approve overtime for attorney personnel," (J.A. at 414, 416 (the 1988 and 1992 Manuals) (emphasis added)), indicating, if anything, that the plaintiffs' overtime work was not officially ordered or approved. The other writings on which the plaintiffs rely are even less supportive of their claim. We have reviewed each of these documents, and none of them includes an express directive to work overtime, and none communicates the approval of overtime work by those officials authorized to order overtime.

Finally, the plaintiffs point to the fact that the DOJ maintained two sets of records of attorneys' work, one of which was used for pay purposes and reflected forty hours of work a week per attorney, while the other was generally used for calculating attorneys fees and budget requests and reflected the number of hours worked by each attorney beyond the standardized forty-hour workweek. The plaintiffs contend that because "authorized officials received monthly or quarterly summaries and compilations of these records" the practice of

maintaining these two sets of records reflects "approval under FEPA." (Br. for Appellees at 23–24 (internal quotation marks and alterations omitted)). This practice does not, however, provide the plaintiffs with the written order or approval necessary to justify compensation under FEPA and its regulations. The maintenance of two sets of records may indicate official awareness of the overtime worked, but it does not provide prior written authorization or approval of such work.

V

In holding that the DOJ is not liable for overtime on an inducement theory, we do not wish to be seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation. Our predecessor court was legitimately concerned that at least in some instances such evasion had occurred and that the government in effect was coercing uncompensated overtime. The government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation. If an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid.[8] But that is not a ground for awarding overtime

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[8] The government itself stated:

> To the extent that some class members believed that individual supervisors were acting inappropriately, they had various avenues of recourse. They could have refused to work extra hours. If penalized, they could have challenged any significant adverse personnel action before the Merit Systems Protection Board, with judicial review in this Court. And . . . they could have reported any suspected FEPA violations to OPM or the Justice Department's Inspector General for investigation; or sought relief through an administrative grievance system that the Justice Department maintains; or challenged the government's overtime policies through the Administrative Procedure Act, to the extent that the CSRA's remedies were not exclusive.

(Br. for Appellant at 61 (citations omitted).)

compensation that was not ordered and approved in strict compliance with the regulation. The problems that this case has exposed suggest that DOJ and other affected agencies might do well to reexamine the whole overtime question for employees not subject to the FLSA and seek a government-wide legislative solution.[9]

CONCLUSION

For the foregoing reasons, we reverse the Court of Federal Claims' grant of summary judgment.

REVERSED

COSTS

No costs.

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[9] As noted above, *supra* n.1, Congress enacted legislation in 1999 that prohibited overtime compensation for DOJ attorneys after November 29, 1999.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 98-896C

JOHN DOE, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

November 14, 2002, Filed

OPINION AND ORDER

HODGES, *Judge*.

This is a class action against the United States on behalf of current and former Department of Justice attorneys who seek overtime pay under the Federal Employees Pay Act, 5 U.S.C. §§ 5542, 5543, and 5545(c)(2) (FEPA).[1] The parties filed cross-motions for summary judgment on the issue of liability. Sections 5542 and 5543 provide that government employees are entitled to premium pay or compensatory time for overtime work that is ordered or approved by authorized persons, with certain exceptions. Section 5545(c)(2) provides premium pay for administratively uncontrollable overtime.[2]

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[1] Additional information may be found in earlier published opinions at *Doe v. United States*, 46 Fed. Cl. 399 (2000); and *Doe v. United States*, 47 Fed. Cl. 594 (2000).

[2] Section 5545(c)(2) states: The head of an agency, with the approval of the Office of Personnel Management, may provide that—

> an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts

The crucial phrase "ordered or approved," as currently construed by the courts, encompasses the members of this Class in the circumstances presented. Attorneys are expected to work overtime and they do so on a regular basis. They are induced to work overtime by direct supervisors, if not authorized officials as defendant would define them. The overtime that they work is well known at the highest levels of the Justice Department. The Department recognizes that it could not function properly within its budget constraints without officially induced and approved overtime work by government attorneys.

The Department of Justice has "ordered or approved" overtime for members of the Class, for purposes of the Federal Employees Pay Act. Class members are entitled to overtime pay if they can meet the standards of proof required by law.

I. BACKGROUND

This class action lawsuit involves more than 10,000 attorneys from Department of Justice divisions across the

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of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

We held that this section does not apply to the Class because "the discretion to determine whether an employee will be provided premium pay under this section rests with the head of the Agency, with the approval of the Office of Personnel Management. Both agencies must exercise discretion in deciding whether an employee is entitled to AUO pay pursuant to this statute." *Doe v. United States*, 46 Fed. Cl. 399, 401 (2000).

. . . . "The Attorney General issued DOJ Order 1551.4A" in response to this authority, but did not include "Attorney" on the list. *Id.*

nation.[3] Plaintiffs are trial attorneys who litigate cases on behalf of the United States. Their caseloads are demanding and often require overtime to complete tasks or to meet deadlines. They are not heavily supervised, in that the conduct of their cases generally is left to their professional judgment. Plaintiffs do not allege that they were explicitly ordered to work overtime by an authorized official, but that management's expectations and their caseloads require work in excess of forty hours a week to complete satisfactorily. *See Anderson v. United States*, 136 Ct. Cl. 365, 393 (1956) ("tone and content of instructions were so cast as to imply (if not overtly to state)" that employees could not acceptably perform their work within forty hours per week.).

Defendant argues that the purpose of the Federal Employees Pay Act is to compensate employees for official extensions of their workday or workweek. The Act is not intended to compensate employees for all hours of job-related activity in which they decide to engage. Plaintiffs are not entitled to premium pay for extra hours unless an authorized official establishes a workday in excess of eight hours or a workweek in excess of forty hours. In this case, no authorized official assigned extra duty hours to any members of the Class. No authorized official directed plaintiffs to perform duties during the period before or after their eight-hour day or forty-hour week. No authorized official expressly approved the performance of extra hours of work by plaintiffs.

Plaintiffs counter that overtime is necessary because of the demanding nature of their responsibilities. They maintain that

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[3] An August 27, 1999 Order stated, "the issues in this case must be litigated as a class action in the interest of justice. Certification is appropriate due to the large number of class members, the predominance of common questions of law and fact relating to DOJ's policy and practice concerning overtime for attorneys, and the adequacy of the current plaintiffs and their attorneys to represent the class." *Doe v. United States*, No. 98-896C (Fed. Cl. August 27, 1999).

work cannot be done to professional standards without overtime. They are entitled to premium pay when they devote extra hours to work-related activities.

Members of this Class are covered by premium pay provisions of the Federal Employees Pay Act unless they are paid at the level of GS-15, step 10 or higher. 5 U.S.C. § 5547.[4] Employees at level GS-10 and below are entitled to pay for ordered or approved overtime unless they request compensatory time in lieu.[5] Attorneys above GS-10 are not necessarily entitled to overtime pay even if it is ordered or approved, but may be given compensatory time instead at the Agency's discretion.[6]

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[4] 5 U.S.C. § 5547 Limitation on premium pay

(a) An employee may be paid premium pay . . . only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed . . .—

(1) the maximum rate of basic pay payable for GS-15 . . .

[5] 5 U.S.C. § 5542 Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 . . . and all that amount is premium pay.

[6] 5 U.S.C. § 5543 Compensatory time off

(a) The head of an agency may—

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under

In summary, the Agency must pay overtime to an employee at level GS-10 and below unless the employee requests compensatory time in lieu. An employee above GS-10 is not necessarily entitled to overtime pay even if it is ordered or approved, but may be given compensatory time instead at the Agency's discretion. Employees above level GS-15 are not entitled to premium pay or compensatory time.

The Federal Employees Pay Act states that employees will be paid overtime "for full-time, and part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of forty hours in an administrative workweek, or . . . in excess of eight hours in a day . . . ." 5 U.S.C. § 5542(a). The key to this case is the meaning of the phrase "ordered or approved" as used above and as applied to the Class.

II. ARGUMENTS

A. Plaintiffs

The parties agree that the facts necessary to this opinion are not in dispute, and that the case is appropriate for summary disposition on liability. While the facts are not complex, their application to the meaning of "ordered or approved" as used in the Federal Employees Pay Act is. No case has addressed circumstances in which litigating attorneys for the Government seek overtime. Case law on the meaning of FEPA and similar laws that provide premium pay for government employees often involve law enforcement officers whose schedules are both unpredictable and uncontrollable. Those

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section 5542 . . . for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 . . . shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

cases are not closely on point, but some are instructive.[7] They suggest a trend from early strict interpretations of the statute, toward a more equitable approach in recent years. *See, e.g.*, *Anderson v. United States*, 201 Ct. Cl. 660, 666 (1973) ("Equity here requires that the natural consequences should be drawn from defendant's failure to schedule the overtime . . . ."); *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986) (law will treat as issued those orders that ought to have been issued).

Plaintiffs urge the court to consider issues relating to the historic application of the phrase "ordered or approved" in light of several important facts. These are the deposition testimony of former Assistant Attorney General Stephen R. Colgate, who agreed that division heads at the Department of Justice "expect" attorneys to work overtime; the fact that the Department of Justice keeps track of actual hours that its attorneys work, including overtime hours, for administrative purposes and to assess attorneys' fees; that full knowledge and approval of overtime worked has been imputed to management through a task force known as the Working Group; and that the Justice Department's employment manual for attorneys provides them blanket direction to work overtime as necessary.

Assistant Attorney General Colgate testified that he did expect that attorneys would work overtime, and that he approved of that policy. He stated that any employee who thought that he or she was working overtime with DOJ approval would have been reasonable in making such an assumption. Plaintiffs believe that the effect of Mr. Colgate's testimony is that DOJ has issued a standing order ("expectation") through its authorized official, for attorneys to work

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[7] Defendant argues that these cases should be limited to those involved in law enforcement. The cases do not suggest that such a limitation is appropriate, however.

overtime. Some offices in the Department of Justice that are represented in the Class are required to keep detailed overtime records for each attorney, in addition to regular time cards showing forty-hour workweeks. These offices account for approximately eighty-five percent of the attorneys in the Class. Plaintiffs have referred to these records as a "second set of books" or "double bookkeeping." They establish both authority and approval, according to plaintiffs, and they prove how much time attorneys actually worked. The overtime records are used for budgetary purposes and to assess attorneys' fees against opposing parties when statutes permit.

Plaintiffs believe that the United States Attorneys Manual confirms a Class-wide policy of requiring (ordering or approving) overtime by officially authorized individuals. The Manual is evidence of a systemic policy that permeates the Department of Justice, they argue, and a statement in the Manual that purports to advise employees that they will not be paid overtime is an effort to subvert requirements of the pay statutes.

The Working Group was assembled by Assistant Attorney General Colgate in 1994 to address the problem that plaintiffs bring before the court now. Officials at the Justice Department knew that attorneys were working overtime, and they needed the overtime to complete DOJ's mission within budgetary constraints. They did not want the Government to pay the costs associated with overtime work, according to plaintiffs. The Group's report was circulated at the highest levels of the Justice Department, and presented to the Attorney General. The Report recommended that the Department seek legislation from Congress exempting attorneys from eligibility for overtime.

B. Defendant

Defendant emphasizes the traditional requirement in this court that only government officials acting with authority may bind or obligate the United States, in this case only by

direct order or approval. No member of the Class has ever requested overtime as required by the statute, defendant notes. Plaintiffs must show a directive to work overtime for a specific period. Cases allowing overtime pay find such specific directives, or perhaps coercion.

Defendant asserts that former Assistant Attorney General Colgate's testimony concerning his "expectation" that attorneys will do what is necessary to get the job done is not an order to work overtime. It cannot serve as a "standing order" for attorneys to work overtime or a "blanket approval" of such overtime. When plaintiffs performed extra hours of work, it was generally because of their dedication and professionalism. They made independent judgments based on applicable external deadlines, the time that they anticipated their tasks would take, and the importance of other tasks to be accomplished during the same time.

"Plaintiffs have never requested overtime pay for any extra hours that they spend," defendant notes. Cases finding liability for overtime usually include policy directives such as "it is expected that *you will perform* without extra compensation . . . ." *See, e.g., Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167, 171 (1963) (emphasis added). This directive should be compared with the DOJ Attorneys' Manual, which states that attorneys "*should expect* to work in excess of regular hours without overtime premium pay." (emphasis added).

According to the Manual, "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay."[8] The

[8] By its terms, the Manual seems to apply only to United States Attorneys and their offices, and possibly to attorneys in other offices who prosecute cases enforcing the laws of the United States. This was not an important argument in the briefs or during a number hearings on this case, however. The Manual is evidence of a climate or culture within the Department of Justice that legally does not depend on the specific department to which it is addressed.

statement that an attorney is likely to work excess or extra hours is not an order to work overtime. For an expectation to be an order or authorization, it must be a requirement—not mere anticipation. It must be explicit in its terms. Stating that attorneys are expected to complete their work is not an order either. All employers expect their employees to complete their work.

Assistant Attorney General Colgate testified, "I guess my view was that attorneys were there to perform the assignments that they were given. I don't know if I would use the term that they were 'induced' to [work] overtime. It was more a notion of a professional who was to . . . perform the necessary efforts to ensure an adequate effort on the assignment given to him."

Defendant disputes the notion that its case management records are a "second set of books." The Department has accounting systems for different purposes. The records track efforts of attorneys irrespective of whether their work was ordered or approved. They are not used for compensation. Authorized officials do not see individual records, but only a compilation. The compilation is presented in summary reports for statistical purposes. At most, the records inform management that plaintiffs were working extra hours.

The Government discounts the significance of the Working Group as evidence of management approval of overtime. The purpose of the Working Group was to determine how various departments were addressing extra hours worked by attorneys and to review the possibility that some offices were compensating attorneys for extra hours and that others were not. The goal was to create a uniform policy for the entire department. The Group did not consider why attorneys were working extra hours and could not therefore have provided evidence that such overtime was expected or required from high-level officials at the Department of Justice.

C. "Ordered or Approved"

The crucial issue remains, what does "ordered or approved" mean in this context. Defendant argues that only a direct command, regulation, or other official action by an authorized person can qualify an employee for overtime pay. According to plaintiffs, the phrase "ordered or approved" means only that the overtime ultimately must be attributable to an authorized person, directly or by implication.

1.

Plaintiffs argue that case law has found "order or approval" from official encouragement, expectation, or inducement, before or after the fact, in writing or orally, by authorized officials or by individuals acting in accordance with their wishes. An express or formal order is not required. This court has stated that "overtime work performed with the knowledge and inducement of supervisory personnel is deemed to be 'officially ordered or approved.'" *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986). *See Adams v. United States*, 162 Ct. Cl. 766 (1963), for a discussion of the importance of considering the nature of an employee's job to determine the degree of formality of approval required.

The Government maintains that claims for overtime must be "actually authorized or approved by an appropriate government official," citing *Gaines v. United States*, 158 Ct. Cl. 497, 500 (1962) *cert. denied*, 371 U.S. 936, 9 L. Ed. 2d 271, 83 S. Ct. 309, 159 Ct. Cl. 614, 167 Ct. Cl. 897 (1962). Case law has evolved since the *Gaines* decision in 1962, however. *See, e.g., Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993); *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986) ("The law will treat as issued those orders that ought to have been issued."); *Anderson v. United States*, 201 Ct. Cl. 660, 666 (1973); *Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167 (1964).

2.

The Federal Employees Pay Act clearly requires an explicit order of overtime for employees to receive overtime pay, according to defendant. One need only compare its requirements with the more well-known Fair Labor Standards Act. 29 U.S.C. §§ 201–219. The Fair Labor Standards Act limits the *employ* of a worker for longer than forty hours per week without overtime pay. 29 U.S.C. § 207(a)(1). "Employ" as defined in the statute, "includes to suffer or permit to work." 29 U.S.C. § 203(g). Thus, an employee need not demonstrate that he was directed or ordered to work overtime, but only that his supervisor was aware that he worked extra hours and did not stop him from doing so. *See, e.g., Forrester v. Roth's IGA Foodliner Inc.*, 646 F. 2d 413, 414 (9th Cir. 1981).

This is the standard used in the private sector and by some government agencies. Congress did not use the "suffered or permitted" language in the Federal Employees Pay Act, and defendant argues that the language of FEPA was an attempt by Congress to establish more strict standards for employees of the type in this Class.

No plaintiff in the Class has requested overtime, and it follows that no authorized official could have ordered or approved it. If an expectation exists within the Department of Justice that its employees will work a certain number of overtime hours for free, this is a management problem that must be addressed as such, not as a class action lawsuit under the pay statutes.

Defendant contends that work not officially ordered or approved would not be compensable under FEPA even if it were "suffered and permitted." Only "hours of work officially ordered or approved" are compensable under FEPA. Defendant's argument on this point is persuasive, and early cases support such a reading. Mere knowledge of extra hours worked was not sufficient to constitute order or approval

pursuant to FEPA. *See, e.g.*, *Tabbutt v. United States*, 121 Ct. Cl. 495 (1952); *Gray v. United States*, 136 Ct. Cl. 312 (1956); *Bilello v. United States*, 174 Ct. Cl. 1253 (1966). Recent cases suggest that a more liberal or equitable standard is appropriate, however.

III. DEVELOPMENT OF THE CASE LAW

A discussion of the law begins with this observation from the dissenting opinion in *Anderson v. United States*, 201 Ct. Cl. 660 (1973): "In the court's decisions in Albright, Baylor, Bates (citations omitted); and this case, the court has taken almost every conceivable position with regard to overtime. Consequently, an employee seeking overtime can likely find an opinion of this court that fits his situation regardless of what it may be." *Anderson v. United States*, 201 Ct. Cl. 660, 675 (1973) (Skelton, J., dissenting). This highlights the difficulty of applying the correct FEPA standard to government employees; its application to litigating attorneys who represent the United States is problematical.

Defendant's argument that plaintiffs must establish specific directions from authorized officials to work overtime is normal procedure in other areas of litigation involving claims against the United States. Most causes of action against the Sovereign require clear direction from an authorized official. For example, this court routinely hears government contract cases in which the dispositive issue is whether an authorized official issued the order or direction upon which a contractor relied. A mere expectation normally would not be equated with an order or direction in a contract case.

A written directive or order to perform overtime work would satisfy the statutory requirement of FEPA under any interpretation. The question in this case is whether less than explicit orders or approvals suffice. For example, plaintiffs argue that the existence of a "culture" within an agency in which employees spend all the time necessary to get the work

done; a "climate" in which long hours are expected either because of the employee's business or profession or because of the nature of work; an "expectation" from top management that employees will work overtime to complete their jobs properly; or an "assumption" that such work will be necessary, may establish "order or approval" for purposes of the statute.

Until *Anderson v. United States*, 136 Ct. Cl. 365 (1956), defendant's position that the law should be strictly construed in this area appeared to be correct. Beginning with Anderson, however, the courts began to use more equitable considerations to decide overtime pay claims against the Government. The phrase "ordered or approved" as used in the pay statutes became subject to broader interpretations, including inducement, encouragement, and perhaps expectation.

A. Strict Interpretation Pre-*Anderson*

The court in *Post v. United States*, 121 Ct. Cl. 94 (1951) noted with displeasure that plaintiff's argument for overtime was based on the fact that his work required it, and "it must have been contemplated that overtime would be necessary." *Post*, 121 Ct. Cl. at 99. Plaintiff failed to prove that he actually performed the overtime, however, and the court commented, "the case as a whole shows the wisdom of the requirement . . . that compensation shall be paid for overtime officially ordered and approved." *Id.*

Plaintiffs in *Tabbutt v. United States*, 121 Ct. Cl. 495 (1952), *Goldstein v. United States*, 121 Ct. Cl. 495 (1952), and *Matlack v. United States*, 121 Ct. Cl. 495 (1952), could not establish that the overtime they worked was authorized or approved by a person with authority. These cases were decided together and overtime compensation was denied in all three. The plaintiff in *Farley v. United States*, 127 F. Supp. 562, 131 Ct. Cl. 776 (1955), lost his bid for overtime because it was not ordered or approved, even though a regulation required that he "remain on duty."

B. A Move Toward Equity—*Anderson v. United States*

The court awarded overtime pay to Customs Inspectors in *Anderson v. United States*, 136 Ct. Cl. 365 (1956). Congress had added overtime coverage for the inspectors and the Commissioner of Customs did not approve of the new policy. The court found that the Commissioner had never made the forty-hour workweek "a reality" and that he suggested "voluntary overtime" to district superintendents and their subordinate supervisory officials. *Anderson*, 136 Ct. Cl. at 370. Moreover, he knew that Customs employees were working "voluntary overtime." *Id.* The Commissioner had authority to order or approve overtime, and "[while] he did not order the work to be performed, he certainly knew and approved of its being done." *Id.*

A Customs regulation provided that written authorization was necessary for employees to qualify for overtime, and no such authority had been granted, but the court held that such a requirement was not in the statute and declined to enforce it. *Id.* at 370. The withholding of written orders "reflected observance of the letter of the regulation but denial of the substance of the statute." *Id.* at 371.

The authorized official in Anderson advised employees that overtime would not be compensated, as the Manual does here. *Id.* at 385. Also, employees submitted time records showing that they worked no more than eight hours per day. A second set of records showing the number of hours actually worked was used for efficiency ratings and to make recommendations for promotion. *Id.* at 392. The court adopted the following finding of fact:

> The fair conclusion from the record as a whole is that the plaintiffs were induced to perform the overtime by the district superintendents and their subordinate officers, and that in providing such inducement the district

> superintendents acted under the leadership and upon the specific suggestion of the Commissioner of Customs.

Anderson, 136 Ct. Cl. at 394.

Gray v. United States, 136 Ct. Cl. 312 (1956) was decided on the same day as Anderson, by the same panel. The court denied overtime pay to a narcotics agent because it "was neither officially approved orally nor in writing" and the evidence did not establish "that plaintiff was induced or directed by his supervisors directly or indirectly by writing or otherwise to work overtime." *Gray*, 136 Ct. Cl. at 313. According to the dissenting opinion, "the Commissioner . . . knew that narcotics agents worked, on the average, 13 hours a week more than the 40 hours named in the [pay statute]," and the case could not be distinguished from *Anderson v. United States*, 136 Ct. Cl. 365 (1956). *Gray*, 136 Ct. Cl. at 313 (Madden, J., dissenting).

Aviles v. United States, 151 Ct. Cl. 1 (1960). Meat inspectors routinely worked overtime in processing plants because of the nature of the job. Regulations required that they be on premises during all meat processing operations. The issue involves distinctions between regularly scheduled overtime and irregular overtime that do not apply here. However, the court discussed the case in terms of fairness and equity, and held that plaintiffs must be paid at the premium levels that they requested.

In *Albright v. United States*, 161 Ct. Cl. 356 (1963) civilian security guards employed by the Norfolk Naval Shipyard were required to report fifteen minutes before their tour of duty began, but there was a "tacit expectation" that they should be there at least twenty minutes early. *Albright*, 161 Ct. Cl. at 357, 359. A regulation required that employees should "report to police headquarters fifteen minutes before going on duty." The court found that the fifteen minute requirement must be compensated as overtime because it was

a part of the regulation, but that the practice of arriving an extra five minutes early was only "tacit" and not therefore ordered or approved.

> Tacit expectation is not equivalent to the statutory requirement of official order or approval. The plaintiffs not only have the burden of proving that they were ordered to appear 20 minutes before the shift started, [but] also that the order was issued by one having the authority to do so.

Id. at 361.

> *Adams v. United States*, 162 Ct. Cl. 766 (1963) applied the principles of *Anderson*. Border Patrol Inspectors were denied overtime because the Commissioner of Immigration and Naturalization had withheld written orders, which should have been issued in the circumstances. The authorized official ordered or approved the work, but would not put it in writing. Some of the assignments were "of an emergency nature" and advance approval in writing was not practical. "With respect to . . . work of this type, it was unreasonable for the Department of Justice to centralize in two high departmental . . . officials" the authority to approve overtime. *Adams*, 162 Ct. Cl. at 770.[9] The court looked to the

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[9] After this case was filed, a United States Attorney sent a memo to her employees stating that the office "anticipates business as usual" but included the following directive from the Executive Office for United States Attorneys:

> To control holiday premium pay, managers should consider issuing memoranda reminding employees that an upcoming holiday is supposed to be a day off with pay and that employees are not expected to report for work unless specifically ordered to do so. An employee who persists and still works on the holiday would get the holiday pay, but could also get a disciplinary action for failure to follow instructions.

She noted that "approval for holiday work shall be required in advance and may be approved by Lanny, Emily, Jim, and after June 1, [[Robin . . .

nature of employees' jobs to determine the degree of formality of the approval required, and found an "implicit authorization" in the Commissioner of Immigration and Naturalization. *Id.* The court ignored requirements for approval that it found to be unrealistic.

Sixty-five investigators for the Alcohol and Tobacco Tax Division sought overtime compensation under the Federal Employees Pay Act in *Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167 (1963). The issue was whether work done beyond the eight-hour day was officially ordered or approved within the meaning of FEPA and Internal Revenue Service regulations. The IRS regulation regarding entitlement to overtime pay required that the overtime "be ordered or approved . . . in writing by an officer or employee to whom . . . authority has been specifically delegated by the head of the department." *Id.* at 171.

The investigators in Byrnes had not qualified for premium pay until a 1954 amendment to FEPA authorized it for them. Federal Employees Pay Act Amendments of 1954 (68 Stat. 1109, 5 U.S.C. § 911 (1958)). Internal Revenue Service granted coverage under the new law for employees in all of its regions, then arbitrarily withdrew authority for premium pay in two of them. (The court later described this arbitrary decision on the part of IRS as a reason for its ruling in favor of the Byrnes employees. *Rapp v. United States*, 340 F.2d 635, 167 Ct. Cl. 852, 868 (1964)).

Officials told employees in Byrnes that they were expected to "perform without extra compensation any overtime that may be necessary to make good cases and achieve effective results . . . ." *Byrnes*, 163 Ct. Cl. at 171. The expectation that employees would work overtime was not tacit, but "was made

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.]]" The authority for approval of holiday pay in this instance apparently was not at the level of Assistant Attorney General or a Division Head.

so explicit in terms as to amount to inducement and compulsion." *Id.* at 174.

Byrnes finds approval in the acquiescence of authorized officials, and perhaps even in the lack of *disapproval.* The court ruled that "plaintiffs' overtime work was performed with the full knowledge, encouragement and inducement of [IRS] officials, as well as the officials in the National Office." *Byrnes*, 163 Ct. Cl. at 174. Furthermore,

> the Regional and National Offices . . . regularly received periodic reports of the overtime work by all investigators in the regions during the period involved in this litigation, and either *approved or acquiesced therein.* These reports were prepared on the basis of regular daily reports by the investigators, including all hours of overtime and an explanation thereof to their supervisors who were primarily responsible for appraisal of essential overtime . . . . There is no evidence of any official disapproval of these overtime reports during the period involved in this case.

Byrnes, 163 Ct. Cl. at 174–75 (emphasis added).

Rapp v. United States, 340 F.2d 635, 167 Ct. Cl. 852 (1964) involved officers of the Federal Civil Defense Administration who had duty officer responsibilities in addition to their forty-hour workweek. Documents related to the duty officer system were couched in mandatory terms. The national office was candid in advising employees that overtime pay was not authorized for these tours. "This candor, however, does not relieve the Government of its responsibility under the statute to pay overtime or premium pay for authorized extra work." *Rapp*, 167 Ct. Cl. at 864 (quoting *Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167, 174 (1964)).

> Plaintiffs were not only 'induced' to perform duty officer tours but were given reasonable and understandable

> grounds for fearing that they might jeopardize their positions if they did not do so. In other words, plaintiffs worked under circumstances that amounted to duress and coercion. Work performed under such circumstances is no more 'voluntary' than a statement or confession in a criminal case which is extracted by threats or promises on the part of a law enforcement or prosecuting officer.

Rapp, 167 Ct. Cl. at 863. *See also Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167, 174 (1964).

The court in *Bilello v. United States*, 174 Ct. Cl. 1253 (1966) denied plaintiffs' claim for overtime pay because a requirement to arrive thirty minutes early was ordered and enforced by supervisory personnel lacking authority under the regulation. This case was the impetus for a strong dissenting opinion in *Anderson v. United States*, 201 Ct. Cl. 660, 667 (1973) (Skelton, J. dissenting).

Plaintiffs quote *Bates v. United States*, 450 F.2d 886, 196 Ct. Cl. 362 (1971) for the proposition that a "memorandum stating that employees should arrive 'sufficiently in advance of the scheduled duty hours to commence work at the scheduled time' constituted necessary authorization for overtime." *Id.* at 367. This decision was anomalous, however, because its outcome depended on a stipulation that the approving official was authorized, mistakenly submitted by defendant. "There is no proof in this record that the head of the department or any staff office head, or their designees, ever ordered or approved the alleged overtime." *Bates*, 196 Ct. Cl. at 373 (Skelton, J., dissenting).

Plaintiffs in *Anderson v. United States*, 201 Ct. Cl. 660 (1973) were nursing assistants at a Veterans Administration Hospital. They were required to arrive early and stay late each day to change in and out of government-issued uniforms. The Anderson court cited *Aviles v. United States*, 151 Ct. Cl. 1 (1960), which it described as an equitable decision,

treating that as done which ought to have been done. "Equity here requires that the natural consequence should be drawn from defendant's failure to schedule the overtime as its own regulation required . . . ." *Anderson*, 201 Ct. Cl. at 666. The court determined that authorized officials "should have been (and it is reasonable to infer from the record as a whole that both were) aware of the [early reporting]." *Id.* at 685 n.9.

A civilian employee working for the Navy recorded his overtime on time cards and turned them in to the proper authority in *Manning v. United States*, 10 Cl. Ct. 651 (1986). He received overtime until supervisors began to worry about the cost and stopped paying him. "Overtime work performed with the knowledge and inducement of supervisory personnel is deemed to be 'officially ordered or approved.' The law will treat as issued those orders that ought to have been issued." *Manning*, 10 Cl. Ct. at 663.

Plaintiffs in *DeCosta v. United States*, 22 Cl. Ct. 165 (1990) were firefighters who argued that they should have received a rate of premium pay higher than their standby pay under the Federal Employees Pay Act. This case addresses a different section of the Federal Employees Pay Act, but it discusses the importance of the nature of employees' jobs in determining the degree of formality of approval required.

Hannon v. United States, 29 Fed. Cl. 142 (1993) involves investigators employed by the Drug Enforcement Administration. Although much of the opinion deals with jurisdiction, it discusses the evolution of decisions under FEPA and the courts' approach toward more equitable standards for finding that overtime has been ordered or approved. The opinion cites the equitable language from *Manning*, 10 Cl. Ct. at 663, discussed above, and finds that "authorization need not necessarily be express." *Hannon*, 29 Fed. Cl. at 149.

IV. DISCUSSION

Stephen R. Colgate was Assistant Attorney General for Administration, in charge of Department of Justice personnel. Mr. Colgate was not aware that he had the authority to approve overtime, and in fact, he thought that it was Justice Department policy not to compensate attorneys for overtime. His understanding of the "culture" of the Department was that attorneys were expected to work overtime when necessary to complete their tasks. He thought it unlikely that attorneys could accomplish their tasks within forty-hour workweeks. Mr. Colgate knew that attorneys were asked to maintain records of hours in excess of eight hours a day and forty hours per week; his department purchased the software that many offices used to keep track of actual hours that they worked. He confirmed that the Department knew that its attorneys were working overtime, that it expected them to work overtime, and that it approved of their working overtime. As a matter of policy, however, the Department did not to pay its attorneys for the overtime that they worked.

Mr. Colgate's deposition essentially confirms that high-level officials at the Department of Justice who had the authority to order or approve overtime knew that its attorneys were working overtime. The general view of the culture within the Department of Justice was that attorneys were expected to do what was necessary to represent the interests of the United States properly. This included working additional hours beyond the forty-hour workweek.

Not having had knowledge of his own authority to approve overtime, Mr. Colgate did not know that he had delegated such authority to Ms. Schiffer for attorneys in the Environmental Division of the Justice Department, or to Ms. DiBattiste for United States Attorneys' offices. The same was true in the case of the Assistant Attorney General in charge of the Civil Division and the Assistant Attorney General in

charge of the Civil Rights Division, whose authority for those components also had been delegated from Mr. Colgate.

The parties agree that former Assistant Attorney General Colgate was the only person who had authority to order or approve overtime for the entire Class. He acknowledged that he knew of no Division within the Department of Justice in which management had found it possible for attorneys to complete their work within a forty-hour workweek.

Deputy Assistant Attorney General John C. Vail was in charge of the Justice Management Division. He had been unaware of the Justice Department Attorneys' Manual but viewed it as being inconsistent with Title 5. Plaintiffs' counsel has represented that Mr. Vail considered the Manual's requirements to be "tantamount" to an order to work overtime. Mr. Vail could not identify a difference between an expectation that attorneys work overtime and an express order to work overtime, according to plaintiffs.

The Attorney General and the Deputy Attorney General asked Mr. Colgate to set up the "Working Group" described in the parties' arguments, above. Mr. Colgate directed Mr. Vail to organize the Group in 1994. Mr. Vail brought together representatives from all components of the Department of Justice, and they met for a period of several months to discuss complaints that the Attorney General had heard from attorneys at town meetings concerning hours and working conditions.

The Working Group concluded that attorneys were working many additional hours that were not being compensated, and that these additional hours not only were expected by management, but also they were used as a basis for evaluations, promotions, and awards.[10] Mr. Colgate and Mr. Vail

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[10] One United States Attorney had an innovative means of encouraging overtime that would appeal to officials in Washington:

> Although AUSAs have improved reporting overtime hours on their . . . report, we have decided to implement a fee structure for failing

reported these findings to the Attorney General. They explained to her that attorneys were working an average of five to nine additional hours per week, and that ordered, approved, or induced overtime should be compensated. They suggested legislation that would exempt Justice Department attorneys from overtime compensation. The Attorney General agreed and sent the proposal to the Office of Management and Budget. OMB objected to providing such an exemption, and no further action was taken.

The Department maintains two systems to track hours that attorneys work. One record shows that all attorneys work eight hours per day, forty hours per week. The other set includes detailed records of the hours that they actually worked. The latter time sheets are used for management and budgeting purposes, according to defendant, but they also are used to rank offices and to bill time for attorneys' fees and costs.

Authorized officials have no knowledge of individual hours worked because these records are seen only in compilation, defendant argues. The records track attorneys' efforts irrespective of whether their work was ordered or approved. They are not used for compensation. No one evaluated them to determine whether the time that was recorded was appropriate, or whether it was ordered or approved. These records apply only to certain divisions and offices, and they do not show what attorneys were doing, or why they were doing it after hours.

The records show substantial overtime among government attorneys, however, regardless of their intent or purpose. Justice Department officials at the highest levels knew of

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to address this important issue. AUSAs currently are averaging 60 hours of overtime a month. Any AUSA failing to meet this average will be expected to pay $1.00 per hour for every hour under 60 hours of overtime a month.

their existence and content. Attorneys in the Class have stated that overtime was an absolute requirement of their jobs and that management expected it. They understood that the records were used in their performance evaluations and for awards and promotions. Keeping track of their overtime in the second set of records was "a constant focus."[11] Plaintiffs consistently testified that they and their supervisors regarded the Manual's statement as an express directive to work overtime when necessary.

Attorneys handled their cases with professional judgment under deadlines that largely were self-imposed. Defendant argues that this element of their responsibilities precludes overtime for attorneys. Whether attorneys should qualify for overtime pay under the Federal Employees Pay Act is an issue that is not before us. Attorneys in this Class are subject to FEPA, and for whatever reason Congress has not exempted them from overtime compensation; nor have they been made subject to other premium pay systems such as AUO.[12]

Prior cases have considered the nature of an employee's work as a factor in determining inducement. *See, e.g., Adams v. United States*, 162 Ct. Cl. 766 (1963); *Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167 (1963). In *Byrnes*, supervisors expected employees to exercise their professional judgment in deciding the amount of time necessary to complete their tasks. *Byrnes*, 330 F.2d 986, 163 Ct. Cl. 167 (1963). Defendant points out factual distinctions between our case and prior cases with regard to the nature of the work

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[11] "The front office published comparisons of the number of overtime hours worked in our district in comparison with the other districts in the country. The reporting of overtime was a constant focus of the front office. The front office communicated a policy of keeping the number of overtime hours at a high level . . . I have been orally advised that increases in staff size relate to the reporting of overtime hours." [Memo to Staff from a U.S. Attorney.]

[12] Administratively Uncontrollable Overtime. 5 U.S.C. § 5545(c)(2).

performed. In the cases plaintiffs cite, employees were subject to duty and it was clear that they would have to perform overtime on a routine basis. "Most investigators, by the very nature of their responsibilities must work irregular hours and perform many hours of overtime duty." *Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167, 171–172 (1963). Plaintiffs were IRS agents who were subject to call twenty-four hours a day. In this case, lawyers often have extra work, but perhaps only sporadically. Defendant notes that "DOJ's mission is not to provide around the clock legal services."

It is true that lawyers are not required to be at the office all the time, but they are required to complete their assignments however long they may take.[13] The Department expects its attorneys to exercise professional judgment, to complete assignments, and to meet deadlines. Lawyers generally are not subject to the same extended overtime on a daily basis as the officers in *Adams*, for example, or the agents in *Byrnes*, but at times they do work at the mercy of judges or opposing counsel. They are subject to exigencies that they cannot always control. The Department of Justice makes it clear that it expects attorneys to finish their job, and the attorneys know it.[14]

Defendant argues that this would be a "tacit expectation" if anything, and does not satisfy even the most liberal standards of "ordered or approved." Plaintiffs in *Albright*, 161 Ct. Cl. at 356, *Adams*, 162 Ct. Cl. 766, and *Hannon*, 29 Fed. Cl. 142,

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[13] Statement in the Manual was "absolutely a directive by the Department to me . . . , that you will work more than forty hours because you're going to have to do your job correctly, we expect that of you, and you're not going to get paid." [Excerpt from an attorney's deposition.]

[14] One attorney testified that the Manual told her what the Department "expected me to do" and that "I am required to work overtime," and that working overtime was a "requirement of the job." [Excerpt from an attorney's deposition.]

had more explicit directions to work overtime than the attorneys in this case, defendant stresses. However, the Department of Justice informed attorneys that it expected them to work overtime when necessary. Authorized department officials testified that they understood the job to require overtime work. The Department's Manual states that attorneys should expect to work in excess of regular hours. These factors, along with management's understanding and approval of the process show that Department officials moved beyond "tacit expectation" into the area of "inducement." *See Byrnes v. United States*, 330 F.2d 986, 163 Ct. Cl. 167, 174 (1963) (expectation that employees would work overtime was not tacit, but "was made so explicit in terms as to amount to inducement and compulsion").

Defendant argues that the Manual does not establish inducement, but merely advises attorneys what they should expect.[15] The Manual states that "attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." Defendant suggests that this phrase was artfully drafted to distinguish it from overtime that will have been "officially approved." The phrase "work in excess of regular hours" is important in defendant's view, but we see it as more support for the conclusion that official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it.

Defendant complains that a judgment here would result in damages being paid retroactively to attorneys who did not ask for overtime pay when it was performed, and therefore did not give the Government the opportunity to make other arrangements. It is essentially an attempt by attorneys to raise

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[15] Defendant's brief states that the Manual "merely emphasizes what Assistant United States Attorneys should anticipate that they as professionals will chose to do in performing their duties, not what the Department expects or orders."

their own salaries unilaterally, after the fact.[16] This is an appealing argument, but the fact remains that the work was done. The United States benefitted from overtime that was actually performed. Denial of benefits to which members of the Class are otherwise entitled would require the court to elevate form over substance. *See Anderson v. United States*, 136 Ct. Cl. 365, 394 (1956) (withholding written orders or approval "reflected observance of the letter of the regulation but denial of the substance of the statute").

The Justice Department Manual states, "United States Attorneys are NOT authorized to approve overtime premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." The Government now argues that this section of the Manual advises prospective employees that they will not be paid overtime, and that this language prevents overtime from ever being "ordered or approved." This language from the Manual could mean that the Justice Department does not pay overtime, so attorneys should not work overtime; or that overtime is common and expected in this business but the Department does not pay overtime, so do not ask for it. In any event, agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime.

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[16] An issue arose during oral arguments involving a hypothetical attorney who played on the computer during the day, took work home at night, then claimed overtime for it. This would be a proof of damages issue, not one of liability. Moreover, it would be a management concern for the Justice Department. Otherwise, attorneys who perform legitimate overtime would be denied benefits because managers failed to supervise their employees properly.

Defendant argues most persuasively that a system of paying litigating attorneys overtime would affect their professionalism adversely.

> The Department wanted to promote professionalism because treating lawyers professionally, rather than as hourly workers, is consistent with the way attorneys see themselves. Ordering and approving overtime work would be inconsistent with and harmful to this professional atmosphere because ordering overtime requires direction concerning when, where, and for how long work is performed. That type of direction detracts from an attorney's autonomy, discretion, and control of his or her work product. It is this level of control possessed by individual attorneys which makes the Department so attractive to its highly qualified lawyers in the first place.

We agree entirely with this statement and commend it. For the purposes of this litigation, however, it is irrelevant. Attorneys in the Class are covered by the Federal Employees Pay Act and they are entitled to overtime if they meet its requirements.[17] Plaintiffs are in this court to vindicate their rights under that law. Though one may speculate on the effects of an award of back pay in this case, including possible changes in procedure, or its impact on professionalism in the Department, those issues are beyond the scope of this court's jurisdiction.

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[17] "It may be that Congress would have been well advised to omit such employees from [FEPA] or to make some different arrangement for their compensation. But Congress did not omit them, and their superiors were not authorized to deny to them the benefits of the Act on the ground that administration of the Act would be difficult . . . ." *Anderson v. United States*, 136 Ct. Cl. 365, 367 (1956).

V. SUMMARY JUDGMENT STANDARDS

Factual issues necessary for the court to make a ruling on liability are not in dispute. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Cross-motions for summary judgment are no more than claims by each party that it alone is entitled to summary judgment. This does not establish that if one is rejected the other necessarily is justified. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 593 (6th Cir. 2001); *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000); *Allstate Ins. Co. v. Occidental Intern., Inc.*, 140 F.3d 1, 2 (1st Cir. 1998); *Reading & Bates Corp. v. United States*, 40 Fed. Cl. 737, 748 (1998). The court must evaluate each party's motion on its own merit, taking care to draw all reasonable inferences against the party whose motion is under consideration. *DeMarini Sports, Inc. v. Worth, Inc.* 239 F.3d 1314, 1322 (Fed. Cir. 2000); *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1338–39 (Fed. Cir. 2001).

We have taken these standards into consideration and determined that trial is not needed to rule on liability. As noted elsewhere herein, trial on damages would be necessary if the parties cannot reach an agreement. "When [an employee] is acting outside his formally assigned hours, and is claiming pay for so acting, he has the burden of showing that what he does is worth doing, and is reasonably calculated to promote the end for which he is employed." *Anderson v. United States*, 136 Ct. Cl. 365, 367 (1956).

VI. CONCLUSION

Overtime is an important management concern. The authority to "order or approve" overtime should be vested in officials who are reasonably available to employees who may be subject to it.[18] To resolve this case, the Department of Justice should agree to abide by the Federal Employees Pay Act; promulgate a procedure for attorneys to request overtime, in advance if possible; delegate clear lines of authority among officials who are reasonably accessible to employees who would request overtime; and create a fund to compensate attorneys for lost premium pay, to be distributed according to a formula crafted by the Class.

Plaintiffs' motion for summary judgment on liability is GRANTED. Defendant's cross motion is DENIED. Counsel will contact the court within thirty days to recommend further proceedings.

Robert H. Hodges, Jr.
Judge

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[18] In *Adams v. United States*, 162 Ct. Cl. 766 (1963), the Attorney General directed that all overtime was to be ordered by the head of the division and approved in advance by an Assistant or Deputy Attorney General. The court found such a requirement to be unreasonable and invalid. Some of the work was emergency in nature and could not be anticipated by a "high official in Washington." The "need for overtime [was] so irregular but recurrent that it would normally be impossible or overly difficult to obtain advance approval from the Washington officials for each specific overtime period to be worked . . . ." *Adams*, 162 Ct. Cl. at 770.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

5 U.S.C. § 5541(2) (2000) provides:

For the purpose of this subchapter—

(2) "employee" means—

(A) an employee in or under an Executive agency;

(B) an individual employed by the government of the District of Columbia; and

(C) an employee in or under the judicial branch, the Library of Congress, the Botanic Garden, and the Office of the Architect of the Capitol, who occupies a position subject to chapter 51 and subchapter III of chapter 53 of this title;

but does not include—

(i) a justice or judge of the United States;

(ii) the head of an agency other than the government of the District of Columbia;

(iii) a teacher, school official, or employee of the Board of Education of the District of Columbia, whose pay is fixed under chapter 15 of title 31, District of Columbia Code;

(iv) a member of—

(I) the Metropolitan Police or the Fire Department of the District of Columbia; or

(II) a member of the United States Secret Service Uniformed Division, a member of the United States Park Police, other than for purposes of section[s] 5545(a) and 5546;

(v) a student-employee as defined by section 5351 of this title;

(vi) [Repealed]

(vii) an employee outside the continental United States or in Alaska who is paid in accordance with local native prevailing wage rates for the area in which employed;

(viii) an employee of the Tennessee Valley Authority;

(ix) an individual to whom section 1291(a) of title 50, appendix, applies;

(x) an employee of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives;

(xi) an employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under subchapter IV of chapter 53 of this title, or by a wage board or similar administrative authority serving the same purpose, except as provided by section 5544 of this title;

(xii) an employee of the Transportation Corps of the Army on a vessel operated by the United States, a vessel employee of the Environmental Science Services Administration, or a vessel employee of the Department of the Interior;

(xiii) a "teacher" or an individual holding a "teaching position" as defined by section 901 of title 20;

(xiv) a Foreign Service officer;

(xv) a member of the Senior Foreign Service;

(xvi) member of the Senior Executive Service; or

(xvii) a member of the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service . . .

5 U.S.C. § 5542 (2000) provides:

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical en-

gineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), and all that amount is premium pay.

(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation,

(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

(B) in which overtime work is therefore unusually taxing; and

(C) in which operating requirements cannot be met without substantial overtime work;

the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(4) Notwithstanding paragraph (2) of this subsection, for an employee who is a law enforcement officer, and whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of—

(A) one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the hourly rate of basic pay of the employee,

and all that amount is premium pay.

(5) Notwithstanding paragraphs (1) and (2), for an employee of the Department of the Interior or the United States Forest Service in the Department of Agriculture engaged in emergency wildland fire suppression activities, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(b) For the purpose of this subchapter—

(1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration; and

(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involved the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

(c) Subsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair [L]abor Standards Act of 1938. In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

(d) In applying subsection (a) of this section with respect to any criminal investigator who is paid availability pay under section 5545a—

(1) such investigator shall be compensated under such subsection (a), at the rates there provided, for overtime work

which is scheduled in advance of the administrative workweek—

(A) in excess of 10 hours on a day during such investigator's basic 40 hour workweek; or

(B) on a day outside such investigator's basic 40 hour workweek; and

(2) such investigator shall be compensated for all other overtime work under section 5545a.

(e) Notwithstanding subsection (d)(1) of this section, all hours of overtime work scheduled in advance of the administrative workweek shall be compensated under subsection (a) if that work involves duties as authorized by section 3056(a) of title 18 or section 37(a)(3) of the State Department Basic Authorities Act of 1956, and if the investigator performs, on that same day, at least 2 hours of overtime work not scheduled in advance of the administrative workweek.

(f) In applying subsection (a) of this section with respect to a firefighter who is subject to section 5545b—

(1) such subsection shall be deemed to apply to hours of work officially ordered or approved in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computation, in excess of 53 hours in an administrative workweek; and

(2) the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay under section 5545b(b)(1)(A) or (c)(1)(B), as applicable, and such overtime hourly rate of pay may not be less than such hourly rate of basic pay in applying the limitation on the overtime rate provided in paragraph (2) of such subsection (a).

5 U.S.C. § 5546(b) (2000) provides:

(b) An employee who performs work on a holiday designated by Federal Statute, Executive order, or with respect to an

employee of the government of the District of Columbia, by order of the District of Columbia Council, is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—

(1) in excess of 8 hours; or

(2) overtime work as defined by section 5542(a) of this title.

28 U.S.C. § 1295(a) (2000) provides:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of—

(A) the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1));

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act .

28 U.S.C. § 1346(a)(2) (2000) provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the Na-

tional Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1491 (2000) provides:

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

31 U.S.C. § 1342 (2000) provides:

An officer or employee of the United States Government or of the District of Columbia government may not accept

voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1350 (2000) provides:

An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $ 5,000, imprisoned for not more than 2 years, or both.

5 C.F.R. § 550.111 (2006) provides:

(a) Except as provided in paragraphs (d), (f), and (g) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—

(1) Officially ordered or approved; and

(2) Performed by an employee. Hours of work in excess of 8 in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or ap-

proved only in writing by an officer or employee to whom this authority has been specifically delegated.

(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under § 610.111(b) of this chapter, overtime work means work in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved, and

(2) Performed by an employee, when the employee's basic pay exceeds the minimum rate for GS-10 (including any applicable special rate of pay for law enforcement officers or special pay adjustment for law enforcement officers under section 403 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), respectively; a locality-based comparability payment under 5 U.S.C. 5304; and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) or when the employee is engaged in professional or technical, engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he or she is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture.

(e) Notwithstanding paragraphs (a) and (d) of this section, when an employee's basic workweek includes a daily tour of duty of more than 8 hours and his hourly rate of basic pay exceeds the hourly rate of overtime pay provided by § 550.113, the department shall pay him at his basic rate of pay for each hour of his daily tour of duty within his basic workweek.

(f)(1) Except as provided in paragraph (f)(2) of this section, for any criminal investigator receiving availability pay under § 550.181, overtime work means actual work that is scheduled in advance of the administrative workweek—

(i) In excess of 10 hours on a day containing hours that are part of such investigator's basic 40-hour workweek; or

(ii) On a day not containing hours that are part of such investigator's basic 40-hour workweek.

(2) Notwithstanding paragraph (f)(1) of this section, all overtime work scheduled in advance of the administrative workweek on a day containing part of a criminal investigator's basic 40-hour workweek must be compensated under this section if both of the following conditions are met:

(i) The overtime work involves protective duties authorized by section 3056(a) of title 18, United States Code, or section 2709(a)(3) of title 22, United States Code; and

(ii) The investigator performs on that same day at least 2 consecutive hours of overtime work that are not scheduled in advance of the administrative workweek and are compensated by availability pay.

(3) Any work that would be overtime work under this section but for paragraphs (f)(1) and (f)(2) of this section will be compensated by availability pay under § 550.181.

(g) For firefighters compensated under subpart M of this part, overtime work means officially ordered or approved work in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computations, in excess of 53 hours in an administrative workweek.

(h) Availability hours, as described in § 550.182(c), are not hours of work for the purpose of determining overtime pay under this section.

(i) An employee is not entitled to overtime pay under this subpart for time spent in training, except as provided in § 410.402 of this chapter.

APPENDIX F

EXCERPTS FROM RECORD

1. *Memorandum, Executive Office for United States Attorneys (November 22, 1977)*

UNITED STATES GOVERNMENT

MEMORANDUM

Date: Nov. 22 1977

TO: All United States Attorneys and Administrative Officers

FROM: Francis X. Mallgrave, Assistant Director for Management, Executive Office for U.S. Attorneys

SUBJECT: Attorney Overtime and Compensatory Time

The practice of authorizing overtime and thus permitting Assistant U.S. Attorneys to accrue compensatory leave credits is contrary to the Department policy of not authorizing overtime for attorney personnel (DOJ Order 1551.3 dtd Nov. 15, 1971). Assistant United States Attorneys are professionals and should expect to work in excess of regular hours of duty without overtime pay or compensatory leave. Accordingly, if you are doing so, please discontinue authorizing and/or reporting overtime pay and compensatory leave for attorneys.

If you have any questions, please contact Mrs. Eileen Menton on FTS 739-3758.

[Logo]

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

2. *Opinion, Office of Legal Counsel (April 21, 1980)*

Deputy Assistant Attorney General
Office of Legal Counsel

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

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21 APR 1980

TO: John H. Shenefield
Associate Attorney General

FROM: Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

SUBJECT: Overtime Pay or Compensatory Time for Attorneys (5 U.S.C. §§ 5542-5543).

This responds to Mr. Ford's memorandum of March 7, 1980, requesting our opinion whether attorneys employed by the Department of Justice are entitled to either overtime pay or compensatory time, or both, under 5 U.S.C. §§ 5542 and 5543.[1] It is our conclusion that those attorneys, other than members of the Senior Executive Service, are entitled to overtime or compensatory overtime, if the conditions of §§ 5542 and 5543 are met and provided that payment does not cause the aggregate rate of pay for any pay period to exceed the maximum rate for GS-15.

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[1] The pertinent portions of §§ 5542 and 5543 are set forth in the Appendix.

I.

Overtime pay for employees of the Executive branch of the Federal government is controlled by 5 U.S.C. §§ 5541-50.[2] The gist of those complex provisions is that employees are to receive "premium pay" or compensatory time for overtime work "officially ordered or approved." 5 U.S.C. § 5542(a).

Overtime work is work in excess of forty hours in an administrative workweek. 5 U.S.C.§ 5542(a).[3] Premium pay for such work is one-and-a half times the rate of pay for grades up to the minimum rate of basic pay for GS-10. For those compensated at a higher rate, and this would seem to include virtually all the attorneys in the Department of Justice, it is one-and-a half of the minimum rate for GS-10. § 5542(a)(1), (2). The overtime or premium pay, however, may not cause the aggregate pay of the employee to exceed the maximum rate of GS-15. § 5547. According to § 5543, compensatory time in lieu of premium pay may be granted for irregular or occasional overtime work. Such compensatory time is at the option of the agency head in the case of employees compensated at a rate higher than the maximum rate of GS-10.[4]

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[2] The Fair Labor Standards Act was extended in 1974 to cover the employees of the Federal Government (29 U.S.C. § 203(e)(2)(A)). The overtime provisions of that Act (29 U.S.C. § 207) do not apply to persons employed in a bona fide professional capacity, such as attorneys. 29 U.S.C. § 213(a)(1), 29 CFR §§ 301, 302(a), (e)(1). Professional employees, however, are not excepted from the coverage of 5 U.S.C. §§ 5541-5550.

[3] In some circumstances overtime is also work in excess of eight hours in a day. 5 U.S.C. § 5542(a). That clause, however, is probably not applicable to attorneys. For the interpretation of that technical provision, we would have to defer to the expertise of the Justice Management Division.

[4] According to Order No. 1551.3, § 8c(1)(c), the limitation of § 5547, *supra*, applies also to an order of overtime work. That section, however, is

The premium pay provisions apply to "employees" as defined in § 5541, i.e., to employees in or under an Executive agency with the exception of the agency head and members of the Senior Executive Service. § 5541 2(A), and (ii), (xvi). There is no statutory exception for professional employees, such as attorneys.

The traditional denial by the Department of Justice of overtime compensation to its attorneys does not rest on statutory grounds. It rests on an internal regulation, now to be found in § 8(a)(1) of Order No. 1551.3 of November 15, 1971, which states that it "is the general policy of the Department not to *order* overtime for attorney personnel" (Emphasis added.) The departmental Order apparently goes back to an early interpretation of the statutory overtime provisions to the effect that overtime must be officially ordered *and* approved, (see *Post* v. *United States*, 121 Ct. Cl. 94, 99 (1952)), so that no overtime is payable in the absence of an official order and a subsequent approval is insufficient.[5] Accordingly, there is no statutory prohibition against the allowance of premium pay or compensatory time for attorneys, and the present failure to allow them, rests only on an internal regulation. A decision to award overtime to attorneys consequently could be put into effect by rescinding § 8(a)(1) of Order No. 1551.3.[6]

Mr. Ford also asked whether the extension of overtime pay to attorneys would require a time-reporting system for attor-

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in terms limited to the *payment* of premium pay under § 5542. We are not aware of the basis for the application of § 5547 to compensatory time under § 5543.

[5] For the subsequent judicial interpretation of § 5542 see Part II of this Memorandum.

[6] See also the discussion in Part II of the question whether § 8(a)(1) accord with the statutory purpose of § 542, and whether it would constitute an effective defense against a suit for overtime brought by an attorney.

neys. Detailed time sheets for attorneys were once required by Deputy Attorney General Kleindienst and apparently were resented. It would seem to us that the introduction of overtime for attorneys should not require a more elaborate time-reporting system than is now in operation with respect to the overtime compensation for clerical personnel. All that would be necessary would be that attorneys initial their *Time and Attendance Report* as they did until a few years ago. This does not mean, of course, that a time reporting system could not be justified as an element of a new Departmental decision to allow premium pay.

II.

We believe that § 8(a)(1) of Order No. 1551.3 should be reexamined not only in the light of the policy issue whether attorneys should be given compensation for overtime as a matter of grace, but also whether the order accords with the statutory purpose of § 5542,[7] and whether it would furnish an effective defense against an attorney's suit for overtime pay.

Section 5542 is derived from § 201 of the Federal Employees Pay Act of 1945, 59 Stat. 296. According to the House Report, submitted by Congressman Ramspeck, one of the principal purposes of the overtime provisions was to provide for extra payment for overtime services "whenever such services *are required by the necessities of government.*" H.R. Rept. No. 726, 79th Cong., 1st Sess., p. 2 (1945). (Emphasis supplied). Again, while explaining the conference report on the bill on the floor of the House Mr. Ramspeck stated "[i]n this bill we are only doing for the employees of

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[7] There is some indication to the effect that the Justice Management Division considers § 8(a)(1) not merely as an expression of policy not to order attorneys to work overtime, but also as a device to escape the payment of premium pay on the theory that such pay is due only where a formal order has been issued, no matter how strongly the attorney was "induced" to work overtime.

the Government . . . what we have by law compelled private employers to do for their employees long ago . . ." 91 Cong. Rec. 6671.[8]

Originally the 1945 Act was given a narrow interpretation. In 1945, shortly after enactment of the statute, the Civil Service Commission issued implementing regulations which were approved by Executive Order No. 9578, 10 F.R. 8191. Section 401(c) of those regulations provided in substance that no overtime could be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the department.[9] In *Post* v. *United States*, 121 Ct. Cl. 94, 99 (1951), the plaintiff claimed that this regulation had nullified the overtime pay provisions of the statute in the circumstances of his case. The court rejected that argument on the ground that the regulation appeared to it "to be only a necessary safeguard against subjecting the Government to improper expense." *Tabbutt* v. *United States*, 121 Ct. Cl. 495, 504-05 (1952) took a similar approach to the overtime problem.

Beginning with *Arnvid Anderson* v. *United States*, 136 Ct. Cl. 365, 368-71 (1956), the Court of Claims, however, modified its approach to the overtime provisions by shifting the emphasis from formal compliance with the regulations to

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[8] Mr. Ramspeck was referring here to the overtime provisions of the Fair Labor Standards Act. Then Congressman Jackson, the Chairman of the Subcommittee in charge of the bill, also repeatedly referred to the Fair Labor Standards Act during his explanation of the bill on the floor of the House. 91 Cong. Rec. 5906. Under the Fair Labor Standards Act compensation for overtime work "suffered or permitted" to be done (see 29 U.S.C. § 203(g)) cannot be evaded by an agreement that overtime work is not permitted unless ordered or authorized by the employer. See 29 CFR § 785.11, and the judicial authorities there cited; *id.* 778.316; and *Federal Regulation of Employment Service*, Vol. 4, § 29.22.

[9] The current 5 CFR § 550.111(c) is substantially identical with § 401(c).

the purpose of the overtime statute, namely, to compensate overtime work that was not volunteered but "induces" by an employee's superior. The court held that where overtime services were performed not voluntarily but due to official pressure, the statutory mandate to pay for overtime was overriding and could not be defeated by the withholding of written orders, especially since that requirement was derived from regulations rather than the statute. The court stated "[t]he withholding of written orders or approval reflected observance of the letter of the regulation but denial of the substance of the statute." *Id.*, at 371. *Arnvid Anderson* was followed by cases such as *Adams* v. *United States*, 162 Ct. Cl. 766, 768-70 (1963);[10] *Byrnes* v. *United States*, 163 Ct. Cl. 167, 173-74 (1963);[11] *Rapp* v. *United States*, 167 Ct. Cl. 852, 863 (1964);[12] *Kenneth Anderson* v. *United States*, 201 Ct. Cl. 660 (1973);[13] *Fox* v. *United States*, 416 F. Supp. 593, 596 (E.D. Va. 1976.)[14]

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[10] The court held invalid an Attorney General's order regulating overtime in the Immigration and Naturalization Service on the ground that it imposed an unreasonable limitation on the authorization of overtime pay.

[11] The court held that the "invocation of departmental regulations requiring specific written authority for overtime cannot avoid the plain requirement of the statute for overtime pay when the performance of this overtime is induced by the Government . . ."

[12] Overtime work performed under oral threats of reprisal if the work were refused is not only "induced" but coerced. It does not constitute voluntary work and the statutory mandate to pay overtime is overriding.

[13] An agency cannot defeat the statutory intent that overtime shall be paid by failing to authorize a field official to approve overtime. Orders that should have been issued are treated as having been issued.

[14] In this case involving Deputy U.S. Marshals the court said:

> "Overtime work performed with the knowledge and inducement of supervisory personnel is deemed to be "officially ordered or approved." The law will treat as issued those orders that ought to have been issued. *Anderson* v. *United States*, 201 Ct. Cl. 660 (1973); *Byrnes* v. *United States*, 330 F.2d 986, 163 Ct. Cl. 167

The trend of the decisions of the Court of Claims is epitomized in *Bilello* v. *United States*, 174 Ct. Cl. 1253, 1257 (1966):

> The common denominator derived from these results is that a regulation requiring approval of overtime by a designated official before it can be paid is binding on claimants unless the regulation is unreasonable or the official who has withheld formal written approval has nevertheless actively induced and encouraged the overtime. Mere knowledge on his part, without affirmative inducement or written sanction, would not seem to be sufficient.

The question whether overtime work has been "induced" within the meaning of the Court of Claims decisions thus constitutes an issue of fact.

As we read the rulings of the Court of Claims, it is very likely that the court will disregard a departmental order establishing a policy not to "order" overtime for work performed by a class of employees who are within the statutory coverage. Moreover, the court is likely to conclude that much overtime performed by attorneys, especially work required to meet short deadlines, has been "induced."

This raises the question whether the Department of Justice should keep in effect an order, which, according to the Court of Claims, is (a) inconsistent with the statutory mandate, and (b) not likely to protect the United States in litigation brought by attorneys for overtime "induced" by their superiors. Mr. Ford's memorandum indicates that several years ago the Department of Justice felt compelled to settle a suit for not "ordered" overtime pay brought by a former attorney, because it realized that it had no defense.

(1963); *Aviles* v. *United States*, 151 Ct. Cl. 1 (1960). The Court has no difficulty in concluding that the overtime involved in this action was officially ordered or approved in such manner."

3. *United States Attorneys' Manual (July 1, 1992 ed.)*

UNITED STATES ATTORNEYS' MANUAL

* * * *

3-2.550 Pay Administration (General)

Other reference(s): DOJ Order(s) 1551.1C, 1551.3, 1551.4A, 1551.5 and 1600.1

FPM chapter(s) 550, Supplement 990-2, Book 550, 5 C.F.R., Part 550

Additional references may be identified within the text of the resource(s) cited above.

A. *Overtime:*

United States Attorneys or their designees are authorized to approve paid overtime for their non-attorney staffs. Payment for overtime is authorized only within the limits of their overtime budgets.

The Executive Office for United States (EOUSA) makes a quarterly allocation of overtime funds to each U.S. Attorney's office based on estimates of overtime requirements within overall budgetary constraints. Estimates of overtime needs are requested from each office quarterly.

Because overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so, it is recommended that the U.S. Attorney delegate in writing authority to approve overtime. Normally, the Administrative Officer or the supervisors who are delegated authority to approve Time and Attendance Records should be delegated the authority to approve overtime.

U.S. Attorneys are *not* authorized to approve overtime for attorney personnel. Assistant U.S. Attorneys are professionals and should expect to work in excess of regular hours without overtime pay.

Overtime compensation earned while in travel status will be controlled by telling the employee when to travel and by what mode. If the employee travels at a different time or by a different mode than that which was ordered, the employee receives the lesser amount of compensation based on actual and estimated travel. *See* DOJ Order 1500.2.

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4. *Executive Office for United States Attorneys, United States Attorneys' Ranking by Overtime, FY 1993*

UNITED STATES ATTORNEYS FY 1993 RANKING IN SELECTED CATEGORIES

* * * *

DISTRICT	OVERTIME			
	Over-time FTE	Overtime Per USA Per Year	Over-time Per USA Per Week	Rank OT Per USA Per Week
Western District of New York	14.06	724.96	13.94	1
Southern District of New York	60.35	672.39	12.93	2
Central District of California	64.32	652.70	12.74	3
Northern District of Illinois	42.32	655.29	12.60	4
Southern District of Texas	37.64	654.61	12.59	5
District of Columbia-District Ct.	29.09	647.07	12.44	6
Eastern District of New York	43.45	643.90	12.38	7
Middle District of Florida	26.60	627.52	12.07	8
District of New Jersey	31.49	618.09	11.89	9
Eastern District of Pennsylvania	31.61	615.11	11.83	10
Southern District of Florida	60.90	613.87	11.81	11
Western District of Texas	23.74	604.32	11.62	12
Northern District of Florida	7.62	695.85	11.46	13
Western District of Kentucky	7.67	548.99	10.56	14
Middle District of North Carolina	3.56	548.50	10.55	15
Middle District of Pennsylvania	6.44	548.09	10.54	16
Eastern District of Wisconsin	6.77	546.86	10.52	17
Eastern District of North Carolina	6.67	545.56	10.49	18
Eastern District of Texas	9.20	545.53	10.49	19
Eastern District of California	13.47	539.63	10.38	20
Eastern District of Virginia	18.10	538.52	10.36	21
Western District of Missouri	11.73	536.35	10.31	22
District of South Dakota	3.92	535.72	10.30	23
Southern District of Illinois	6.03	534.86	10.29	24
Southern District of Indiana	5.98	533.38	10.26	25
Wyoming	3.59	532.61	10.24	26
Middle District of Louisiana	3.07	530.81	10.21	27
Northern District of West Virginia	3.52	521.48	10.03	28
District of Puerto Rico	7.34	511.12	9.83	29
Southern District of West Virginia	5.64	510.50	9.82	30
Western District of Pennsylvania	10.29	508.51	9.78	31
Southern District of Iowa	3.77	507.55	9.76	32
District of Nevada	8.27	506.97	9.75	33

Northern District of Ohio	14.33	489.43	9.41	34
Western District of Washington	10.48	484.19	9.31	35
Northern District of New York	6.81	484.10	9.31	36
Western District of Virginia	4.11	477.59	9.18	37
District of Massachusetts	17.62	469.39	9.03	38
Eastern District of Missouri	9.34	468.58	9.01	39
Northern District of Iowa	3.93	465.51	8.95	40
Southern District of California	19.46	459.91	8.84	41
District of Maine	4.23	453.76	8.73	42
Eastern District of Louisiana	9.89	450.93	8.67	43
District of Delaware	2.38	450.86	9.67	44
District of Maryland	13.16	448.15	8.62	45
District of Guam/NMI	1.30	445.47	8.57	46
Northern District of Georgia	12.22	445.38	8.56	47
District of South Carolina	8.68	443.60	8.53	48
Eastern District of Tennessee	4.86	442.98	8.52	49
District of Hawaii	4.73	438.43	8.43	50
Central District of Illinois	5.02	437.62	8.42	51
Oregon	7.91	437.23	8.41	52
Northern District of Indiana	5.33	433.06	8.33	53
District of Minnesota	7.86	430.68	8.28	54
District of Connecticut	8.57	423.21	8.14	55
Eastern District of Oklahoma	1.84	420.11	8.08	56
District of Nebraska	4.08	419.29	8.06	57
Eastern District of Michigan	16.48	415.90	8.00	58
District of Montana	2.30	413.13	7.94	59
Middle District of Georgia	4.12	411.21	7.91	60
Northern District of California	16.21	406.18	7.81	61
Southern District of Mississippi	4.73	397.03	7.64	62
Middle District of Alabama	3.05	396.00	7.62	63
Middle District of Tennessee	3.36	395.74	7.61	64
District of Arizona	15.68	394.32	7.58	65
Western District of Michigan	5.54	392.35	7.55	66
District of Idaho	2.59	388.97	7.48	67
Northern District of Mississippi	3.24	387.98	7.46	68
Eastern District of Kentucky	5.49	387.22	7.45	69
Western District of Oklahoma	5.84	384.53	7.39	70
Western District of Louisiana	4.90	381.87	7.34	71
District of Virgin Islands	3.15	375.47	7.22	72
Western District of Wisconsin	2.77	373.89	7.19	73
Utah	3.72	373.08	7.17	74
District of Colorado	8.69	368.73	7.09	75
Eastern District of Arkansas	3.49	368.73	7.03	76
Southern District of Alabama	3.10	365.33	7.01	77
District of Kansas	5.13	359.76	6.92	78
Western District of North Carolina	2.63	352.70	6.78	79
Eastern District of Washington	2.97	349.02	6.71	80
District of Alaska	2.36	343.51	6.61	81
Northern District of Alabama	5.83	325.45	6.26	82
Northern District of Oklahoma	2.90	324.30	6.24	83
Western District of Arkansas	1.67	318.97	6.13	84

Southern District of Ohio	5.94	318.60	6.13	85
District of New Hampshire	2.22	312.21	6.00	86
Western District of Tennessee	4.12	309.71	5.96	87
District of North Dakota	1.50	308.91	5.94	88
Northern District of Texas	11.58	308.09	5.92	89
District of New Mexico	3.93	304.79	5.86	90
Southern District of Georgia	3.37	302.79	5.82	91
District of Vermont	21.6	299.72	5.76	92
District of Rhode Island	2.25	283.12	5.44	93
	985.38	42,682	9.90	

5. Memorandum for Attorney General From Assistant Attorney General for Administration (March 12, 1996)

U.S. Department of Justice
March 12, 1996 Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

FROM: STEPHEN R. COLGATE
Assistant Attorney General for Administration

SUBJECT: *Pay Equalization for Attorneys*

PURPOSE: To obtain the Attorney General's decision on the strategy to be pursued with respect to Administratively Determined (AD) pay for all Department of Justice attorneys.

TIMETABLE: Decision is sought as quickly as possible so that the strategy may be implemented as part of the Fiscal Year (FY) 1997 appropriations process.

BACKGROUND: In 1995, the Justice Management Division (JMD) completed a departmentwide study of overtime practices regarding attorneys. After reviewing the results of the study, JMD concluded that:

- Attorneys are rarely *ordered or approved* to perform overtime work.
- Attorneys are frequently *expected* to, and do, work more than 8 hours per day and/or 40 hours per week without extra compensation.
- General Schedule (GS) attorneys and Assistant U.S. Attorneys (AUSAs) are covered by the premium

pay provisions (e.g., overtime rules) of title 5, U.S. Code).[1]

- The estimated annual cost of compensating all attorneys for all extra hours worked would be $43.0 million ($45.4 million in 1997 dollars).
- If challenged, the Department might be found liable for back overtime pay and interest on the grounds that attorneys were "induced" to work extra hours.

JMD concluded that the most appropriate long-term approach to this issue would be to obtain legislation exempting Department attorneys, including AUSAs, from the premium pay provisions of title 5. They would then, for overtime pay purposes, be subject only to the Fair Labor Standards Act (FLSA), from which they would be exempt as "professional employees."

At the same time, there has been controversy in the Department since at least 1988 over the differences between the pay of AUSAs and Department attorneys paid under the General Schedule. Legislative action which would 1) move all Department attorneys under an AD pay system and 2) exempt all attorneys from the premium pay provisions of title 5 would address both of these issues. A draft legislative proposal is attached.

AD Pay System

Under the AD system, the law (28 U.S.C. 548) authorizes the Attorney General to set the annual salaries (but not the total compensation) of 93 U.S. Attorneys and about 4,400 AUSAs and Special AUSAs. The AUSA pay system bases annual salaries on years of attorney experience and performance. Forms of compensation *other than* annual salaries (such as

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[1] Members of the Senior Executive Service are <u>not</u> eligible for premium pay.

awards and hour-for-hour overtime pay) are still subject to the governmentwide rules in title 5.

Under the title 5 governmentwide pay system, the annual salaries of the remaining approximately 3,650 attorneys in the Department are determined under the 15-grade General Schedule (GS) or, at higher levels of responsibility, the 6-level Senior Executive Service (SES). As in the AD system, forms of compensation other than annual salaries are subject to the governmentwide rules in title 5.

This fragmented approach to attorney compensation has created anomalies that are difficult to explain or defend. For example, the average salary for nonsupervisory GS attorneys is 10 to 15 percent lower than the average salary for non-supervisory AUSAs. As another example, time-in-grade and the duties of a GS attorney's position are the main determinants of his or her annual salary. Under the AUSA pay systems, performance and attorney experience are the main determinants of annual salary.

The Department's FY 1997 budget request included $30.6 million to extend a pay system similar to the AUSA pay system to GS and SES attorneys (breakdown attached). The Office of Management and Budget (OMB) did not act favorably on this request and it will not be included in the President's budget.

Options

Option 1—Full Funding. Resubmit a legislative proposal to OMB that would give the Attorney General broad compensation-setting authority over all attorney positions in the department and seek funding to accompany the change.

Cost: The projected FY 1997 cost of extending the AUSA pay system to all GS/SES attorney positions is $30.6 million.

Pros:

- Eliminates, on a prospective basis, potential pay claims for "induced" overtime work;
- Promotes consistency in an area that has been the subject of complaints of inconsistency;
- Authorizes the Attorney General to eliminate hard-to-justify pay discrepancies between AUSAs and GS/SES attorneys.

Cons:

- May be difficult to obtain OMB concurrence because of budgetary impact; will face similar resistance from the Congress;
- May encounter resistance from the Office of Personnel Management (OPM), which oversees the government-wide implementation of title 5, and other agencies which employ attorneys;
- May encounter resistance from unions (including groups like the National Association of AUSAs) (NAAUSAs) over employee exemption from title 5 premium pay provisions.

Option 2—Phased-in implementation. Submit a legislative proposal as described under Option 1, but request only partial funding, or no funding, at this time. It would be possible, if AD authority were granted for litigating division attorneys, to convert them to the AD system at their current salaries, at no additional cost.

Cost: Less than the cost of Option 1. However the specific cost of this option would depend upon the speed and extent of implementation. Some components may be able to absorb the cost of implementation for certain critical positions, while others may be forced to defer even partial implementation until funds are specifi-

cally appropriated for this purpose. We would undoubtedly want to take a uniform approach to the implementation of any new pay system, at least with respect to the headquarters components. If the authority exists, there will be strong pressure to equalize pay by raising litigating division salaries.

Pros:

- allows relatively quick relief targeted to the most critical positions—e.g., supervisory positions in the litigating divisions;
- establishes a statutory foundation for an eventual departmentwide AD pay system;
- eliminates, on a prospective basis, potential pay claims for "induced" overtime work.

Cons:

- depending upon the extent and nature of initial implementation, may lead to complaints of inconsistency/disparate treatment within the ranks of GS/SES attorneys, as well as in comparison to AUSAs;
- provides no guarantee that a pay-equalized AD system will ever be implemented on a departmentwide basis;
- may be opposed by OPM and others as in Option 1;
- may be opposed by OMB and in Congress as a "camel's nose under the tent" strategy.

Option 3—Status quo. Take no action at this time.

Cost: In the short term, this option has no cost. However, by failing to deal with the potential liability for overtime pay, this option could perpetuate a potentially substantial liability for back pay and interest.

Pros:

- requires no additional resources and no action for the present.

Cons:

- fails to deal with potential liability for overtime pay;
- perpetuates a potential embarrassment to the Department as the chief enforcer of Federal law, including overtime statutes; and
- fails to address pay discrepancies between AUSAs and GS/SES attorneys.

Option 4—Bring AUSA salaries more in line with GS salaries.

Regardless whether action is taken with respect to the litigating divisions' attorney salaries, AUSAs' salaries could be "capped" or "frozen" to allow GS/litigating division salaries to catch up with them. This could be done in a variety of fashions, which would eliminate or slow the growth of AUSA salaries.

Cost: Future cost would be reduced to the extent that AUSA salary growth is limited.

Pros:

- could eliminate salary disparity over time;

Cons:

- would be opposed by Executive Office for U.S. Attorneys, (EOUSA), Attorney General's Advisory Committee, NAAUSA, and others;
- would not, by itself, address the overtime pay issue;

DISCUSSION: We have discussed the first three options with the litigating divisions and with the EOUSA. There was general agreement among litigating division staff that, in

concept, Option 1 would be desirable. However, as a practical matter, they also agreed on the following three points:

1) Due to the current budgetary prospects for the litigating divisions, any approach which does not provide full funding would require reductions in staffing levels.

2) There is a significant risk that pursuing Option 1 or 2 would only heighten the already intense Congressional scrutiny of attorney staffing allocations, and could accelerate the trend toward reprogramming litigation resources from centralized general legal activities to geographically disbursed U.S. Attorney offices.

3) The risk of failing to address the Department's potential liability for overtime pay is moderate, especially when compared with the risks and costs involved in pursuing Options 1 or 2. EOUSA staff is concerned that by not adopting Option 2, the pay disparity problem can only be addressed within its AD pay system (as suggested in Option 4). Further, EOUSA believes, the overtime issue will still need to be addressed because once any changes are made to the AD pay system to depress or cap salaries, we can anticipate employee demands for overtime compensation. I believe EOUSA would oppose Option 4.

RECOMMENDATION: I recommend that the department pursue Option 2, as the only option which addresses the long-term issues of pay equalization and overtime pay, while recognizing the immediate challenge of limited resources. There is an inherent risk in this approach, of course, in light of Senator Hatch's recent inquiry about cases being handled by Division attorneys and other Congressional interest in the movement of resources to U.S. Attorneys' offices. However, I

believe the long-term interests of the Department will be best served by trying to address this issue head-on.

I am prepared to discuss these issues at your convenience.

Attachments

DECISION:

The Department will pursue the following option with respect to achieving administratively determined pay:

___ Option 1. Legislative change and full funding.

[/s/ JReno] Option 2. Legislative change and partial (or no) funding.

___ Option 3. No action.

___ Option 4. Limit AUSA pay growth.

/s/ Janet Reno 4/13/96
JANET RENO Date

6. Memorandum, Assistant Attorney General, Office of Legal Counsel

To: All OLC Employees

From: Walter Dellinger
Assistant Attorney General
Office of Legal Counsel

Re: OLC Policy on Compensatory Time and Flexible Work Schedules

This memorandum establishes a formal policy by which certain employees in the Office of Legal Counsel can take compensatory time when they have performed irregular or occasional overtime work. This policy is designed to enable the office to carry out its duties as efficiently and fairly as possible. The achievement of that goal will always depend more on the professional responsibility of the office's staff than on formal policies and procedures. Thus, this formal policy on compensatory time is not intended to make the office's staff keep track of each minute worked or not worked but rather to ensure that employees will not work substantial overtime hours without compensation.

This memorandum also establishes a formal policy governing the treatment of requests for flexible work schedules. As set out more fully below, such requests will be granted, to the extent possible, In view of the needs of the office.

I. Coverage

The policy on compensatory time applies to all employees under the GS pay schedule who are paid above the GS-10 level. It does not apply to employees in the Senior Executive Service or to consultants and experts. The policy regarding flexible work schedules applies to all employees.

II. Earning and Using Compensatory Time

When employees in the Department are required to work beyond their usual hours. they are entitled to overtime pay or compensatory time. For employees paid above the GS-10 level, supervisors can determine that compensatory time, rather than overtime pay, shall be available. This policy constitutes such a determination by the Office of Legal Counsel.

Each employee shall report to the Executive Officer any overtime that the Office requires him or her to work. The Executive Officer shall note the amount of any such work on the official time records for the employee. In figuring whether work is overtime, the employee and Executive Officer should take into account that OLC generally does not require that senior personnel punch a clock or insist that such personnel comply with specific and identical arrival and departure times. Indeed, such rigidity would run counter to the demands of the Office and to the standards of professionalism that govern senior employees. Therefore, not all work before or after any particular time will necessarily qualify as overtime work. A rough guide is that work after 7:00 p.m. will be considered overtime for most employees, as will work on weekends or holidays.

Subject to the usual procedures for requesting leave, employees who have accrued compensatory time may use that time in lieu of annual leave. Under the Department's regulations and the underlying statutes, however, the total compensation received an employee in any pay period, including both regular salary and compensatory time, may not exceed the compensation for GS-15, step 10 ($3471 per pay period in 1994). For employees paid in excess of the minimum rate for GS-10, the value of compensatory time is computed as one and one-half times the hourly rate of basic pay for GS-10 (one and one-half times $15.34 in 1994, equaling $23.01). For example, an employee who earns $49,947 per year (GS-

13, step 1) earns $1,921 per pay period. Such an employee can take no more than 67 hours of compensatory time in a pay period because any additional hours of compensatory time would put the employee over the $3471 per pay period ceiling. Necessarily, as an employee's base salary increases, the number of hours of compensatory time that employee can use in a pay period decreases. An employee must use his or her compensatory time by the end of the leave year following the one in which it was earned.

III. Flexible Work Schedules

Department policy allows some opportunity to provide employees with flexible work schedules. Any employee who would like to alter his or her work schedule should submit a written request to the Executive Officer who will review the request with a Deputy Assistant Attorney General designated by the Assistant Attorney General. Such requests will be granted to the extent possible, consistent with the needs of the office, in light of the purpose and duration of the request. Requests should state the work hours being requested, the reason for the request, the duration of the request, and the employee's assessment of the impact, if any, the granting of the request will have on the performance of his or her job responsibilities.

7. Memorandum of Deputy Associate Attorney General (November 9, 1998)

From: Allegra Fran M

Sent: Monday, November 09, 1998 7:10 PM

To: Onek, Joseph N; Fisher, Raymond C; Schreiber, Jayne; Chernof, Kenneth L

Subject: Transition outline

Attached is the revised draft of my transition outline. Let me know if you have any comments or questions.

Fran

* * * *

ii. Overtime. It is likely that the Federal overtime statute applies to our attorneys. Generally, my impression is that any time one of our attorneys sues under this statute, JMD negotiates a quick settlement. Several years ago, a working group was convened to look at this issue. At that time, no one in JMD or elsewhere could mount a reasonable argument that our attorneys were not covered by the overtime statute. JMD estimated that the Department's exposure to overtime at that point (based on a three-year statute of limitations) amounted to approximately $40 million. I believe that it is problematic (some might use the term unconscionable) for the Department to continue to not pay its attorneys overtime knowing full well that the overtime statute applies. There was a considerable consensus in the working group to extend the AD Pay System to the Division attorneys—overtime is not allowed under that system. In any event, if the Department continued to ignore this problem, sooner or later, an intrepid attorney will develop a class action on this issue and major problems will result.

8. *Memorandum, Executive Office for United States Attorneys, Average Attorney Work Week (June 14, 1999)*

[SEAL] U.S. Department of Justice
Executive Office for United States Attorneys
Office of the Director *Washington, D.C. 20530*

MEMORANDUM—Sent via Electronic Mail

DATE: June 14, 1999

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS

FROM: Donna A. Bucella
Director

SUBJECT: *Average Attorney Work Week, First Quarter FY 99*

ACTION REQUIRED: None, information only.

CONTACT PERSON: Betty Free
Acting Assistant Director
Case Management Staff
(202) 616-6919

This report provides you with the average Assistant United States Attorney (AUSA) work week by United States Attorney's office (USAO) for all USAOs for the first quarter of FY 99. These reports can serve as useful management tools for you and your supervisory AUSAs in providing information about the hours they spend on specific kinds of matters and cases.

AVERAGE ATTORNEY WORK WEEK

For the period OCT-1998 thru DEC-1998

Rank	District Name	Average Work Week
1	Western District of North Carolina	52.54
2	Central District of California	52.22
3	Southern District of New York	52.01
4	District of Columbia	51.49
5	Southern District of Florida	51.44
6	Northern District of California	51.38
7	Eastern District of New York	51.37
8	Western District of New York	50.99
9	District of New Jersey	50.90
10	Northern District of Indiana	50.65
11	Southern District of Illinois	50.55
12	District of Maryland	50.31
13	Western District of Texas	50.12
14	District of Connecticut	49.96
15	Central District of Illinois	49.92
16	Northern District of Oklahoma	49.89
17	Eastern District of Pennsylvania	49.89
18	Northern District of Illinois	49.88
19	Eastern District of California	49.71
20	District of Idaho	49.63
21	District of Nevada	49.61
22	Southern District of Indiana	49.46
23	Southern District of Texas	49.44
24	Northern District of Florida	49.36
25	Southern District of California	49.36
26	Northern District of New York	49.33
27	District of South Dakota	49.13
28	Eastern District of Wisconsin	49.11
29	District of Nebraska	49.05
30	Northern District of Georgia	49.02
31	Middle District of Florida	49.00
32	District of Delaware	48.89
33	Western District of Wisconsin	48.88
34	Northern District of Iowa	48.81
35	District of Minnesota	48.76
36	Middle District of Alabama	48.61
37	District of Puerto Rico	48.52

38	Eastern District of Washington	48.52
39	District of Montana	48.38
40	Western District of Washington	48.36
41	District of Wyoming	48.30
42	Northern District of West Virginia	48.23
43	Eastern District of Texas	48.23
44	District of Massachusetts	48.18
45	Middle District of Tennessee	48.15
46	Northern District of Ohio	48.15
47	District of Guam	47.98
48	District of Arizona	47.97
49	Western District of Missouri	47.92
50	Northern District of Alabama	47.90
51	Middle District of Pennsylvania	47.82
52	District of Alaska	47.80
53	Middle District of Georgia	47.75
54	District of Colorado	47.71
55	Southern District of Alabama	47.65
56	District of Kansas	47.62
57	Western District of Michigan	47.62
58	Southern District of West Virginia	47.53
59	Eastern District of Kentucky	47.51
60	District of Hawaii	47.45
61	Southern District of Iowa	47.36
62	Eastern District of Michigan	47.36
63	District of Maine	47.33
64	District of Virgin Islands	47.24
65	Western District of Louisiana	47.19
66	District of New Mexico	46.97
67	Eastern District of Virginia	46.95
68	Eastern District of Missouri	46.94
69	District of Utah	46.86
70	District of Oregon	46.83
71	Eastern District of Tennessee	46.81
72	Eastern District of Louisiana	46.65
73	Western District of Oklahoma	46.64
74	Southern District of Mississippi	46.61
75	Western District of Pennsylvania	46.57
76	Western District of Kentucky	46.54
77	District of South Carolina	46.43
78	District of New Hampshire	46.42
79	Eastern District of North Carolina	46.40

80	Southern District of Ohio	46.39
81	District of North Dakota	46.36
82	Eastern District of Oklahoma	46.36
83	Middle District of Louisiana	46.15
84	Western District of Virginia	46.10
85	Northern District of Texas	46.04
86	Eastern District of Arkansas	45.91
87	Southern District of Georgia	45.85
88	District of Rhode Island	45.55
89	Northern District of Mississippi	45.44
90	Western District of Tennessee	45.43
91	Middle District of North Carolina	45.38
92	Western District of Arkansas	45.25
93	District of Vermont	45.14
	Mean Average	48.21

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MAR 1 2007
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SUPREME COURT, U.S.

(2)

No. 06-808

In the Supreme Court of the United States

JOHN DOE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
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QUESTION PRESENTED

Whether the court of appeals, after considering its prior decision from which this Court denied certiorari, correctly held that petitioners, a class of current and former Department of Justice attorneys, cannot obtain an award of hourly overtime compensation for work performed between 1992 and 1999, because the work was not ordered or approved in writing by an authorized official, as required by a regulation that implements the Federal Employees Pay Act of 1945.

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In the Supreme Court of the United States

No. 06-808

JOHN DOE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-24a, 38a-66a) are reported at 463 F.3d 1314 and 372 F.3d 1347. The opinions of the Court of Federal Claims (Pet. App. 25a-37a, 67a-96a) are reported at 63 Fed. Cl. 798 and 54 Fed. Cl. 404.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2006. The petition for a writ of certiorari was filed on December 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Employees Pay Act of 1945 (FEPA) to address the compensation of federal

employees in the post-war environment. The provision at issue governs hourly overtime compensation. It states:

> For full-time, part-time and intermittent tours of duty, hours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * * at [specified rates].

5 U.S.C. 5542(a) (2000 & Supp. IV 2004) (emphasis added).

The FEPA expressly delegated rulemaking authority to the Civil Service Commission. FEPA, ch. 212, § 605, 59 Stat. 304. Days after the FEPA became law, the Civil Service Commission issued implementing regulations that were approved by the President in Executive Order No. 9578, 3 C.F.R. 86 (1945). Section 401(c) of those regulations provided that compensable overtime must be officially ordered or approved in writing by an authorized official:

> No overtime in excess of the administrative workweek shall be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the department or independent establishment or agency, or Government-owned or controlled corporation.

Exec. Order No. 9578, 3 C.F.R. 86 (1945).

In 1968, the Commission revised its regulations but "ma[de] no substantive changes." 33 Fed. Reg. 12,402 (1968). The revised regulations were adopted verbatim by the Office of Personnel Management (OPM), which supplanted the Civil Service Commission and has been granted express authority to prescribe regulations to

administer the FEPA. See 5 U.S.C. 5548. The OPM regulation at issue provides:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. 550.111(c).

In 1999, in response to this litigation, Congress enacted a statute barring the payment of overtime compensation to Department of Justice (Department or DOJ) attorneys for work performed after the enactment of that legislation. See Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, § 1000a, 113 Stat. 1501A-21 (5 U.S.C. 5541 note); see Pet. App. 39a n.1.[1]

2. Petitioners are a class of more than 9000 present and former Department of Justice attorneys who filed this Tucker Act lawsuit in 1998. C.A. App. 232-233. The

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[1] The 1999 legislation provides:

> (a) None of the funds made available by this or any other Act may be used to pay premium pay under title 5, United States Code, sections 5542-5549, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> (b) Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

113 Stat. 1501A-21.

complaint alleged that "because defendant expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, [it] authorized and approved the overtime under 5 U.S.C. § 5542." *Id.* at 246.

Following discovery, the Court of Federal Claims granted summary judgment with respect to liability for the entire plaintiff class. Pet. App. 67a-96a. After recognizing that the plaintiff class had received no explicit orders or approvals, written or otherwise, to perform particular work in excess of a 40-hour week, *id.* at 77a, the court declared that "[t]he question in this case is whether less than explicit orders or approvals suffice," *id.* at 78a.

The court answered that question in the affirmative. It observed that the Court of Claims had "taken almost every conceivable position with regard to overtime." Pet. App. 78a (quoting *Anderson* v. *United States*, 201 Ct. Cl. 660, 675 (1973) (Skelton, J., dissenting)). The trial court recognized that decisions of the Court of Claims in the years following enactment of the FEPA would not have permitted overtime compensation in this litigation. *Id.* at 79a. It concluded, however, that beginning with *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956), the cases had moved toward the use of "more equitable considerations to decide overtime pay claims against the Government." Pet. App. 79a.

The court found evidence that the Department had a "culture" of expecting overtime in the deposition testimony of Stephen R. Colgate, the Assistant Attorney General for Administration, who was "the only person who had authority to order or approve overtime for the entire Class." Pet. App. 87a-88a. The court believed

that Colgate's "understanding of the 'culture' of the Department was that attorneys were expected to work overtime when necessary to complete their tasks." *Id.* at 87a. The court found additional evidence of the Department's culture in the U.S. Attorney Manual and various other documents. *Id.* at 88a-93a.

The court thus entered summary judgment for the plaintiff class with respect to liability. Pet. App. 95a-96a. It indicated that in subsequent damages proceedings, a class member would be entitled to recover if he could show "that what he [did was] worth doing, and [was] reasonably calculated to promote the end for which he [was] employed." *Id.* at 95a (quoting *Anderson*, 136 Ct. Cl. at 367).

3. On the government's interlocutory appeal, a unanimous panel of the Federal Circuit (Rader, Bryson, and Dyk, J.J.) reversed. Pet. App. 38a-66a. "Because the overtime here was not officially ordered or approved in writing as required by the [OPM] regulation," the court held that "the plaintiffs were not entitled to compensation under FEPA." *Id.* at 38a.

The court of appeals concluded that the Court of Claims' *Anderson* line of cases could not be reconciled with this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam), and *OPM* v. *Richmond*, 496 U.S. 414 (1990). Pet. App. 49a-53a. *Hansen*, the court noted, established that "[a] court is no more authorized to overlook [a] valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." *Id.* at 51a (quoting *Hansen*, 450 U.S. at 790). The *Anderson* line of cases, by contrast, had refused to give effect to the OPM regulation "because it added a procedural writing requirement to the substantive requirements of FEPA,"

a mode of analysis that could not survive *Hansen*. *Id.* at 49a.

The court explained that the *Anderson* line of cases "fares no better if it is viewed as resting on 'equitable' considerations," because "*Hansen* directly held that such considerations could not impose liability on the government, a result reinforced in [*Richmond*]." Pet. App. 52a (internal citation omitted). The court observed that *Richmond*, relying on *Hansen*, "rejected the plaintiff's estoppel claim because 'the equitable doctrine of estoppel cannot grant [the plaintiff] a money remedy that Congress has not authorized.'" *Ibid.* (quoting *Richmond*, 496 U.S. at 426, 429).

The court rejected petitioners' other challenges to the validity of the OPM regulation. It observed that Congress authorized OPM to prescribe regulations "necessary for the administration" of FEPA, 5 U.S.C. 5548(a), a grant of authority that allows the agency to fill statutory gaps. Pet. App. 53a-54a. The court held that the regulation reasonably implemented FEPA's directive that compensation be limited to extra hours of work that were "officially ordered or approved." *Id.* 55a-61a. The court stressed that the regulation, which was issued by the Civil Service Commission almost contemporaneously with the enactment of the statute, *id.* at 61a, was directly responsive to Congress's concern that there be adequate controls over paid overtime to ensure that the Treasury did not face unanticipated liabilities. *Id.* at 60a-61a.

After rejecting petitioners' challenge to the validity of the regulation, the court of appeals held that the regulation's writing requirement was not satisfied in this case. Pet. App. 62a-65a. The court observed that "the vast majority of the writings cited by the plaintiffs were

not written by officials with proper delegated authority to 'officially order[] or approve[],' 5 U.S.C. § 5542(a), overtime." *Id.* at 62a (brackets in original). Moreover, the court explained that "even those writings that were arguably issued by officials who were arguably authorized to order overtime are not orders or approvals within the meaning of the statute and regulation." *Id.* at 63a.

The court rejected petitioners' heavy reliance on the U.S. Attorney Manual. Pet. App. 62a-63a. Petitioners relied on a portion of the Manual stating that Assistant United States Attorneys "are professionals and should expect to work in excess of regular hours without overtime premium pay." *Id.* at 64a. The court explained that the Manual thereby "instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime." *Ibid.* Further, the court explained that the Manual "repeatedly emphasizes the following two directives: 'overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so' and 'U.S. Attorneys are not authorized to approve overtime for attorney personnel.'" *Ibid.* (quoting *U.S. Attorney Manual* (1988) and *ibid.* (1992)). Thus, the Manual indicates, "if anything, that the plaintiffs' overtime work was not officially ordered or approved." *Ibid.*

The court found the other documents cited by the petitioners to be "even less supportive" of their claims. Pet. App. 64a. For example, the court explained that the maintenance of case management records showing hours worked beyond the 40-hour workweek "may indicate official awareness of the overtime worked, but it does not provide prior written authorization or approval of such work." *Id.* at 65a.

The court of appeals stressed that it was not "countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation." Pet. App. 65a. "If an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid." *Ibid.* The court emphasized, however, that "that is not a ground for awarding overtime compensation that was not ordered and approved in strict compliance with the regulation." *Id.* at 65a-66a. Thus, the court reversed the decision of the trial court and held that summary judgment should be entered for the government. *Id.* at 38a, 66a.

4. The court of appeals denied a petition for rehearing and rehearing en banc, without recorded dissent. See Pet. App. 27a.

5. This Court denied a petition for a writ of certiorari. See *Doe* v. *United States*, 125 S. Ct. 1591 (2005) (No. 04-742).

6. On remand, the Court of Federal Claims entered summary judgment for the government and dismissed the complaint. See Pet. App. 9a-10a. Petitioners moved for reconsideration of that order, and argued that the court of appeals' ruling on their claims for overtime compensation under Section 5542 did not bar them from pursuing: alternative arguments for overtime compensation under 5 U.S.C. 5542 (2000 & Supp. IV 2004); claims for holiday work pay under 5 U.S.C. 5546(b); and claims for administratively uncontrollable overtime (AUO) pay under 5 U.S.C. 5545(c)(2). Pet. App. 10a.

The trial court denied the motion for reconsideration. Pet. App. 25a-37a. It held in part that petitioners' "alternative" arguments were precluded by the court of appeals' holding that overtime must be ordered or ap-

proved in writing by an authorized official to be compensable. *Id.* at 33a-35a. The court also noted that the precedents relied on by the court of appeals were decided before the initiation of this litigation. *Id.* at 36a.

7. On petitioners' appeal, a unanimous panel of the Federal Circuit (Rader, Schall, and Prost, J.J.) affirmed. Pet. App. 1a-24a. The court of appeals held that petitioners' "alternative" arguments for overtime compensation under Section 5542 were foreclosed by its previous ruling. *Id.* at 10a-14a. In particular, the court rejected the contention that the government could be directed to pay compensation for overtime that was not ordered or approved in writing by an authorized official, as required by the OPM regulation, if petitioners could show that the Department had not implemented a workable system for authorizing overtime. *Id.* at 11a-13a. The court explained that, as in the previous appeal, petitioners' "equity-based arguments" for seeking overtime pay without regard to the requirements of the governing regulation fail under this Court's decisions in *Hansen* and *Richmond*. *Id.* at 13a. The court further noted that its earlier decision did not set forth a new legal standard, but instead relied on this Court's decisions in *Hansen* and *Richmond*, which were decided before petitioners initiated this case. *Id.* at 14a.[2]

ARGUMENT

This Court denied certiorari from the initial court of appeals decision rejecting petitioners' overtime claim and ordering the entry of judgment for the government

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[2] The court of appeals also rejected petitioners' claims for AUO and holiday work pay. Pet. App. 14a-24a. Because the petition for a writ of certiorari does not challenge those rulings, petitioners have abandoned their claims for AUO and holiday pay.

in this case. *Doe* v. *United States*, 125 S. Ct. 1591 (2005) (No. 04-742). For the second time, in the context of petitioners' unsuccessful effort largely to relitigate matters resolved against them in the prior appeal, a unanimous panel of the Federal Circuit has rejected petitioners' claim for a retroactive award of hourly overtime compensation for hours of work that were not officially ordered or approved pursuant to the governing regulation. That decision, like the initial one, is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, legislation enacted during this litigation deprived the issue of prospective significance. Further review is again not warranted.

1. Petitioners contend (Pet. 2-4) that the past conduct of various Department officials should be deemed to satisfy the FEPA's requirement that compensable overtime be "officially ordered or approved," 5 U.S.C. 5542(a) (2000 & Supp. IV 2004), notwithstanding the regulatory requirement that such orders or approvals be made in writing by an authorized official, 5 C.F.R. 550.111(c). That issue lacks prospective significance.

As the court of appeals explained (Pet. App. 39a n.1), Congress enacted legislation in 1999 that prohibits the payment of premium pay to Justice Department attorneys for work performed after the enactment of that legislation:

> Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual

> employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department Appropriations Act, 2000, Pub. L. No. 106-113, § 1000a, 113 Stat. 1501A-21. The sections of Title 5 referenced by Congress include those that provide for overtime pay, see 5 U.S.C. 5542 (2000 & Supp. IV 2004), and compensatory time, see 5 U.S.C. 5543. Thus, the 1999 legislation bars the award of either overtime pay or compensatory time to Department attorneys.

In a footnote, petitioners suggest (Pet. 29 n.9) that this legislation lacks prospective effect beyond fiscal year 2000. By its express terms, however, the 1999 amendment applies to "any work performed on *or after* the date of the enactment of the Act." § 1000a, 113 Stat. 1501A-21. And the following year, Congress confirmed that the amendment "shall apply hereafter." Department of Justice Appropriations Act, 2001, Pub. L. No. 106-553, 114 Stat. 2762A-68. Thus, there is no doubt that Congress amended the substantive law, as it may do in appropriations statutes. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).[3]

Petitioners contend (Pet. 5, 29) that the decisions of the court of appeals could have government-wide impact. Petitioners' theory in this case is a highly fact-specific one, however, that turns on the unique culture and practices of the Department of Justice. See, *e.g.*, Pet. 2-11. Indeed, after the trial court's original summary judgment ruling in favor of petitioners on liability, petition-

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[3] Petitioners' reliance on *Auburn Housing Authority* v. *Martinez*, 277 F.3d 138 (2d Cir. 2002), is misplaced. The *Auburn* court faced "two seemingly conflicting provisions * * * enacted as part of the same legislation," and the decision was based on those "unique circumstances." *Id.* at 146.

ers argued that the standards for interlocutory appeal were not satisfied because the trial court's ruling was "unique to the specific facts of this case," in part because other agencies compensate attorneys for overtime. Plaintiffs' C.A. Response to Pet. for Permission to Appeal 10, 19. Petitioners similarly argued that the Justice Department is the "glaring exception" to agencies' payment of overtime to attorneys. 03-5075 C.A. Appellee Br. 13.

The trial court's summary judgment ruling had broad significance because it potentially authorized employees throughout the government to claim unknown amounts of overtime pay for work that had *not* been explicitly ordered or approved through official channels. But there is no reason to believe that the court of appeals' decisions sustaining the controlling regulation will have any practical impact outside of this case.

2. In addition to lacking prospective significance, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

a. The regulation that has always governed the availability of overtime compensation under the FEPA validly requires that compensable overtime "be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. 550.111(c). Congress vested the Civil Service Commission and its successor, OPM, with authority to prescribe regulations to administer the FEPA. See 59 Stat. 304; 5 U.S.C. 5548. Under established principles of administrative law, their regulations are entitled to deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227-230 (2001); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Indeed, particular deference is warranted because the overtime regulation—issued within days of the FEPA's effective date—represents the contemporaneous interpretation of the statute by the principal Executive Branch advocate of the legislation, to which Congress expressly delegated rulemaking authority. See Pet. App. 61a; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").

The regulation reasonably implements the FEPA's directive that compensable overtime be "officially ordered or approved." 5 U.S.C. 5542(a) (2000 & Supp. 2004). Whereas the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, authorizes compensation for overtime work that was merely "suffer[ed] or permitt[ed]," 29 U.S.C. 203(g), the FEPA's requirement that compensable hours be "officially ordered or approved" contemplates a formal mechanism for ensuring control over liability for overtime. Because "FEPA does not specify the form in which overtime must be 'ordered or approved,'" however, the court of appeals correctly concluded that the statute leaves a gap for the agency charged with its administration to fill. Pet. App. 55a.

The Civil Service Commission's contemporaneous regulation responds directly to concerns expressed by Congress during the hearings on the FEPA. During the 1945 hearings before the House Committee on Civil Service, members of Congress expressed concern to Arthur Flemming of the Civil Service Commission that the proposed legislation could allow federal agencies to incur overtime liability beyond the scope of their budgets. *Salary and Wage Administration in the Federal Ser-*

vice: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service, 79th Cong., 1st Sess. 50-51 (1945) (*House Hearings*). Representative Miller suggested that the budgetary process might permit adequate oversight and control because agency budgets would have to specify the amounts allotted for overtime compensation. "[T]he final check," he observed, "is the money that will have to be very definitely set up in the budgets of the departments for overtime pay." *Id.* at 51.

Representative Vursell, however, was uncertain that specifying overtime in agency budgets would adequately ensure congressional control over expenditures. He pointed out that Congress had "deficiency appropriations brought in rather regularly." *House Hearings* 51. Thus, Representative Vursell was "fearful that you don't have that check." *Ibid.* In response, Commissioner Flemming assured Congress that the requirement that compensable overtime be "officially ordered or approved" would prevent the government from becoming subject to unexpected monetary liability. *Ibid.* He explained that, "speaking now for my own agency, I know that the regulations under which overtime is ordered and compensated for are very strict, and in most instances requests for approval have to come all the way to the top." *Ibid.* And he added that, "under normal conditions, when appropriations would be much tighter than they are at the present time, the head of the agency, I can assure you, would put even stricter controls on than he might at the present time. If he didn't he would find himself in a position where he couldn't meet his pay roll." *Ibid.*

In short, Congress intended that overtime compensation would be paid only as specifically authorized by agency officials responsible for observing budgetary

constraints. Under no circumstances was Congress to be presented with requests for deficiency appropriations. In light of that legislative history, the court of appeals correctly recognized that the implementing regulation "serves an important purpose of the statute—to control the government's liability for overtime," "so as not to subject the Treasury to unanticipated liabilities." Pet. App. 60a.

b. The petition does not contest the facial validity of the governing regulation, but nonetheless contends (Pet. 17-26) that the government must pay retroactive compensation to a class of more than 9000 for overtime that was never ordered or approved in writing by an authorized official, as required by the governing regulation. Petitioners assert (Pet. 24-26) that the past conduct of various Department officials estops the government from relying on the statutory and regulatory requirements—requirements that were designed to protect the Treasury from "unanticipated liabilities." Pet. App. 60a.

That argument lacks merit. Even accepting for the sake of argument petitioners' characterization of the past conduct, their argument fails under *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam), and *OPM* v. *Richmond*, 496 U.S. 414 (1990). Indeed, in their previous petition for a writ of certiorari, petitioners conceded that under *Hansen* and *Richmond*, "estoppel does not lie to obtain payment contrary to a valid statute or regulation." 04-742 Pet. at 14 (emphasis omitted). As this Court has explained, Congress's power to control appropriations requires that the government's monetary liability depend on statutory and regulatory requirements, not alleged estoppels contrary to those requirements. See *Hansen*, 450 U.S. at 788, 790; *Richmond*, 496 U.S. at 424.

Even if estoppel could ever lie against the government for payment of money contrary to the requirements of a statute or regulation, petitioners still miss the mark in arguing (Pet. 5, 14) that the decisions of the court of appeals will allow the federal government to "coerce volunteer work" by "repeal[ing]" the "statutory right to overtime pay." Notwithstanding such rhetoric, the only issue in this case was whether class members could demand retroactive compensation for overtime that had not been officially ordered or approved in compliance with the governing regulation—*not* whether employees could refuse to work overtime that had not been officially ordered or approved. As the trial court found, "[n]o plaintiff in this case has requested overtime, and it follows that no authorized official could have ordered or approved it." Pet. App. 77a.

Moreover, the court of appeals stressed that it was not "countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulations." Pet. App. 65a. To the contrary, "[i]f an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid." *Ibid.*

While petitioners now insist (Pet. 19-20) that even *voluntary* overtime is barred by the Antideficiency Act, 31 U.S.C. 1342, they did not make that argument below, the issue was not addressed by the courts below, and the issue was therefore waived. In any event, no court has ever held that voluntary overtime is barred under the Antideficiency Act, and Congress enacted the 1999 legislation barring attorney overtime pay knowing full well that many Department attorneys work extra hours without receiving (or expecting) additional compensation.

c. The circuit conflict that petitioners allege over estoppel principles (Pet. 22-23) is illusory. In all of the published decisions that petitioners cite in support of the alleged conflict, the courts *rejected* estoppel claims. Moreover, most of those cases did not even involve claims for monetary relief against the government. The petition claims (Pet. 23) that an unpublished decision of the Ninth Circuit, *Winter* v. *United States*, 93 F. Appx. 145 (2004), is "similar" to this case. But *Winter* did not concern the FEPA, and instead concluded that the government was estopped from relying on a statute of limitations. Even as to the limitations issue it did address, *Winter* is not binding precedent within the Ninth Circuit. See 9th Cir. R. 36-3. See also *Mauting* v. *INS*, 16 F. Appx. 788, 789 (9th Cir. 2001) (unpublished immigration decision, not concerning claims for monetary relief, that remanded for consideration of "colorable" estoppel claim).[4]

d. Contrary to petitioners' suggestion (Pet. 26), there was no basis for a remand to the district court "to allow the parties an opportunity to litigate under the new standard." The initial decision of the court of appeals did not announce a new standard; instead, it required adherence to the requirements of the overtime regulation that had been in place since the FEPA was enacted in 1945, and it relied on decisions of this Court that predated the filing of this lawsuit.

Although petitioners now fault the court of appeals for deciding whether their evidence satisfied the re-

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[4] Although the petition (Pet. 25) cites *Portmann* v. *United States*, 674 F.2d 1155, 1159 (7th Cir. 1982), it does not allege a conflict with that decision. *Portmann* pre-dated *Richmond*, and it distinguished *Hansen* on the theory that features of the Postal Service meant that estoppel would not "threaten the public fisc." *Id.* at 1165.

quirements of that regulation, the court of appeals reached that issue at petitioners' express invitation. See 03-5075 C.A. Appellee Br. at 34 (urging in the alternative that "the regulation was satisfied here" and that the "record abounds with orders and approvals 'in writing' by authorized officials"); *id.* at 34-37 (describing the purported evidence); *id.* at 9 (arguing that "the undisputed record demonstrates that, time and again, the Department of Justice through authorized officials, in writing, has officially approved overtime *and* ordered it"); *ibid.* (arguing that "[o]vertime was officially ordered and approved in writing by Department-wide policy statements, including the Department-wide *United States Attorneys' Manual*, and by orders to particular employees").

After carefully reviewing the "wide variety of writings" that petitioners invoked, the court of appeals concluded that "none of them includes an express directive to work overtime, and none communicates the approval of overtime work by those officials authorized to order overtime." Pet. App. 62a, 64a. The petition does not take issue with that fact-intensive determination, which would not warrant this Court's review in any event.

Moreover, as the court of appeals explained, petitioners' "alternative" legal theories are merely variants on the arguments they pressed on the first appeal. Pet. App. 12a-14a. Overtime hours are compensable under the FEPA only if the hours were "officially ordered or approved." 5 U.S.C. 5542(a) (2000 & Supp. IV 2004). On the first appeal, petitioners urged that this requirement should be deemed satisfied "if authorized officials, either before or after the fact, expected, encouraged, induced, or otherwise manifested their approval of the performance of overtime, either orally or in writing." 03-5075

C.A. Appellee Br. at 14. On the second appeal, petitioners urged that this requirement should be deemed satisfied if the Department did not have a "workable system for obtaining written authorization[.]" 05-5104 C.A. Appellant Br. at 44.

As the court of appeals explained, neither argument provides a basis for disregarding the requirements of the governing regulation. Pet. App. 13a. Petitioners had, at most, a right to refuse to work extra hours, and any adverse personnel action taken in response might well have been invalid. *Id.* at 65a. But petitioners were not free to work extra hours and then demand retroactive compensation without regard to the requirements of the regulation. *Id.* at 65a-66a. That demand is at odds with one of Congress's key purposes, to place controls on "the government's obligation to pay overtime so as not to subject the Treasury to unanticipated liabilities." *Id.* at 60a. In short, just as with the initial petition for a writ of certiorari in this case, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JOHN DOE, On Behalf of Himself and
All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Remarkably, the Government's Opposition does not deny that the Department of Justice ("DOJ") knowingly engaged in a decades-long pattern of deception and misconduct, sanctioned by DOJ's top officials, that effectively eviscerated its attorneys' statutory right to overtime pay under the Federal Employees Pay Act, 5 U.S.C. § 5542(a) (2000) ("FEPA"). The Government does not dispute that, as the Court of Federal Claims found, DOJ attorneys were officially required to work substantial amounts of overtime, *Doe v. United States*, 54 Fed. Cl. 404, 405 (2002) (*Doe I*), but DOJ officials were directed never to approve even a single hour of that work in writing, *see id.* at 414, 416. Nor does the Government contest that DOJ's top officers repeatedly misled its attorneys by issuing official statements declaring that attorneys were not entitled to compensation for the hundreds of extra hours they were required to work each year. *See* Pet. 9–10.[1]

Instead, the Government contends that this case is not important enough to warrant this Court's time because DOJ was *entitled* to evade its statutory obligations by refusing to "officially" authorize overtime pay in writing and that, in any event, this case has no effect beyond DOJ. To the contrary, the Federal Circuit's interpretation of the federal statute governing overtime pay for all federal employees has continuing government-wide impact and warrants review by this Court, and the confusion and conflicting positions of the circuit courts of appeals concerning equitable estoppel of the Government demand resolution.[2]

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[1] "Pet." refers to the Petition for Writ of Certiorari. "Opp'n" refers to the Brief for the United States in Opposition. Citations to "A." refer to the appendix to the Petition for Writ of Certiorari.

[2] The Government contends that the Petition for Certiorari "does not challenge" the Federal Circuit's ruling dismissing their claims for administratively uncontrollable overtime ("AUO") and holiday pay. Opp'n at 9 n.2. In fact, the Petition included Petitioners' claims for holiday pay, *see*

I. The Writ Should Be Granted Because the Interpretation of FEPA Is of Continuing Government-Wide Significance.

The Government contends that this Court should deny *certiorari* because this case is of no prospective significance. It stresses that this case is of no future importance to DOJ because, after the Government's numerous failed attempts to amend FEPA to exempt DOJ attorneys, it managed to include an appropriations rider in the 2000 omnibus appropriations bill purporting permanently to bar the use of funds to pay DOJ attorneys overtime.[3] Opp'n at 10.

It is far from settled whether the language used in the 2000 appropriations rider has prospective applicability, *see* Pet. 29 n.9, but even if it does, this case is of great national significance because it involves the legal rights of the Government's 2,713,200 civilian employees—especially its 1,061,019 professional and administrative employees whose overtime pay depends exclusively on § 5542(a). *See* Pet. at 15 & n.4. Singing the opposite tune from its earlier position that this case has widespread consequences, *see* Pet. of the U.S. For Permission to Take an Interlocutory Appeal at 8, the Government now contends that "there is no reason to believe that the court of appeals' decisions . . . will have any practical impact outside of this case" because Petitioners' claims are "highly fact-specific" and "turn[] on the unique culture and practices of [DOJ]." Opp'n at 11–12. To the contrary, the Federal Circuit's ruling establishes the definitive standard for *all* future overtime claims under FEPA, and provides *all* federal agencies license to require their employees to work overtime, refuse to provide specific written authorizations for

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Pet. at 4, 15, and the denial of administratively uncontrollable overtime is intertwined with Petitioners' as-applied challenge.

[3] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 106-553, § 1 (a)(2), 114 Stat. 2762, 2762-A68 (2000).

such work, and thereby deny them overtime pay under the authority of 5 C.F.R. § 550.111(c) (2006).

Hard experience demonstrates that DOJ is far from the only federal agency willing to employ such tactics to cheat its employees out of overtime pay. There are scores of cases in which employees throughout the federal government won compensation for overtime work that their supervisors or agencies demanded of them without providing specific written authorization. *See, e.g.*, *Taylor v. United States*, 223 Ct. Cl. 655 (1980) (Army civilian security guards successfully sued for overtime pay for required overtime work for which he received no specific written authorization); *McQuown v. United States*, 199 Ct. Cl. 858 (1972) (same successful claim by ATF investigator).[4] This case offers this Court the opportunity to stop this nefarious practice before it spreads and to prevent a return to the era of governmental manipulation and exploitation of its employees that *Anderson v. United States*, 136 Ct. Cl. 365 (1956), and its progeny sought permanently to end.

The Government also contends that this case is unworthy of this Court's time because DOJ's attorneys—and, by the Government's reasoning, the other 2.7 million federal civilian employees—simply could have refused to perform required overtime work. The Government argues that "any adverse

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[4] *See also Hannon v. United States*, 29 Fed. Cl. 142 (1993) (denying Government's motion to dismiss overtime pay claims of DEA investigators required to work overtime without specific written authorization); *DeCosta v. United States*, 22 Cl. Ct. 165 (1990) (overtime pay awarded to Air Force firefighters required to work overtime without specific written authorization); *Fox v. United States*, 416 F. Supp. 593 (E.D. Va. 1976) (same for Deputy U.S. Marshalls); *Baylor v. United States*, 198 Ct. Cl. 331 (1972) (same for GSA security guards); *Bates v. United States*, 196 Ct. Cl. 362 (1971) (same for VA nursing assistants); *Rapp v. United States*, 167 Ct. Cl. 852 (1964) (same for duty officers for federal Civil Defense Administration); *Byrnes v. United States*, 163 Ct. Cl. 167 (1963) (same for ATF investigators).

personnel action [against such employee] *might well have been* invalid." Opp'n at 19 (emphasis added); *see also id.* at 8, 16 (*quoting Doe v. United States*, 372 F.3d 1347, 1364 (Fed. Cir. 2004) (*Doe II*) (A. 65a)). Tellingly, the Government is not willing to say without qualification that a federal employee may not be disciplined for refusing to work uncompensated mandatory overtime. More importantly, it defies credulity to imagine that federal employees can simply refuse required overtime work due to lack of specific written authorization. The Government cannot seriously contend that the Assistant United States Attorneys involved in the trials of Timothy McVeigh, Terry Nichols, the Unabomber, or Sheik Omar Abdel-Rahman (the first World Trade Center bomber), the Microsoft antitrust trial, the federal tobacco litigation, the Ruby Ridge or Waco standoffs or ensuing litigation, or other labor-intensive cases were free simply to "call it a day" at 5:00 P.M. or have their weekends to themselves, especially when high-level DOJ officials testified that overtime was necessary and approved. *Doe I*, 54 Fed. Cl. at 407; Pet. at 8. Had Petitioners or other federal employees done as the Government now recommends, the Government very well may have ground to a halt.

The Federal Circuit is the only court with jurisdiction to consider overtime claims against the Government. *See* 28 U.S.C. §§ 1295(a)(2), (a)(3) (2000). The Government does not dispute that, if this Court declines to grant *certiorari*, the Federal Circuit's rulings will be the judiciary's last word on this issue and will control the overtime rights of all 2.7 million federal civilian employees. *See* Pet. at 15–16. There will be nothing to stop any federal agency from meeting its budgetary goals on the backs of its rank-and-file employees by requiring them to work overtime while making it impossible for them to fulfill § 550.111(c)'s writing requirement and denying them overtime pay as a result.

II. The Government Has No Response to Petitioners' Argument that 5 C.F.R. § 550.111(c) Is Invalid as Applied.

The Government spends a good deal of its brief arguing that 5 C.F.R. § 550.111(c) is "entitled to deference," Opp'n at 12, "reasonably implements [5 U.S.C. § 5542(a)]," *id.* at 13, and is consistent with FEPA's legislative history, *id.* at 13–14. These arguments concerning § 550.111(c)'s facial validity ignore the main issue. Petitioners' first ground for seeking *certiorari* was that § 550.111(c) is invalid *as applied* to this case. *See* Pet. at 17–20 (*citing United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999)). Petitioners argued that, even assuming the Government *generally* may require employees to obtain prior written approval of overtime work under § 550.111(c), that requirement is invalid *as applied* in an agency in which employees regularly are required to work overtime but nevertheless are precluded from receiving specific written approval for it. In such cases, § 550.111(c) "is an unreasonable implementation of" the statutory language of § 5542(a) and "will not control." *Haggar Apparel*, 526 U.S. at 392. As a matter of law, if the Government chooses to condition a statutory right upon a regulatory requirement, it cannot make it impossible for a person to satisfy that requirement. The main case on which the Government and the Federal Circuit relied, *Schweiker v. Hansen*, 450 U.S. 785 (1981), is irrelevant because it concerns whether *valid* regulations must be enforced. That begs the question here, which is whether the regulation at issue was *valid as applied.*

The Government similarly ignores Petitioners' argument about the Antideficiency Act, 31 U.S.C. § 1342 (2000), which provides yet a further example of DOJ's nonsensical interpretation of § 550.111(c). If DOJ's implementation of § 550.111(c) is permitted to stand, top DOJ officials and supervisors throughout the nation repeatedly will have violated this *criminal statute* by accepting (indeed, requiring)

voluntary services from DOJ attorneys and essentially mandating that they waive part of their statutorily established salaries. Pet. at 19–20.[5]

The Government's discussion of FEPA's legislative history—its only apparent response to the as-applied challenge—turns the statute on its head. While DOJ ignores the primary purpose of the statute—to require overtime pay—even the legislative history the Government cites further demonstrates that DOJ's application and implementation of § 550.111(c) flouts Congress's intent. The Government concedes, "Congress intended that overtime compensation would be paid only as specifically authorized by agency officials responsible for observing budgetary constraints." Opp'n at 14–15. DOJ, however, refused to permit *any* agency official to "specifically authorize[]" its attorneys' required overtime work in writing, declined to implement *any* system for obtaining written approval of required overtime work, and refused to adopt *any* budget for payment of overtime to its attorneys. FEPA's legislative history provides no support for DOJ's unlawful refusal to pay overtime for mandatory work.

III. The Writ Should Be Granted Because the Federal Circuit Created a Circuit Conflict as to Whether the Government Ever Is Subject to Equitable Estoppel.

The Government also attempts to dissuade this Court from granting *certiorari* for Petitioners' second argument: that the Government should be equitably estopped from enforcing a regulation that it deliberately made impossible to satisfy. Opp'n at 17. The Government does not deny that the Federal Circuit imposed a blanket ban on equitable estoppel claims against the Government, no matter how egregious its actions,

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[5] Contrary to the Government's assertion, Petitioners raised the Anti-deficiency Act below, *see, e.g.*, Pl.'s Opp'n to Def.'s Mot. for Summ. J. & Pl.'s Cross-Mot. for Summ. J. at 72, and, in any event, it is not an independent claim subject to waiver.

or that the Federal Circuit's extreme position represents a departure from the law of nearly every other circuit.

Instead, the Government attempts to minimize the significance of the circuit split by claiming that, in many cases in which the regional circuit courts recognized that the Government could be equitably stopped, the court ultimately did not rule in favor of the plaintiff. Opp'n at 17. That is irrelevant to the existence of a circuit conflict because the Government does not and cannot dispute that virtually every regional circuit court has expressly recognized the viability of governmental estoppel. *See* Pet. at 21–24. Perhaps more importantly, the Government's argument is factually incorrect because numerous other circuits have equitably estopped the Government in a variety of cases, many involving federal funds or federal employment.

For example, in *Bunting v. Railroad Retirement Board*, No. 92-3879, 1993 U.S. App. LEXIS 24663 (6th Cir. Sept. 22, 1993), the agency awarded benefits to an injured worker, but held a lien against any proceeds he might receive in a personal injury lawsuit. The Board agreed to seek only $8,400 in reimbursement, but later attempted to recover additional funds from the worker. The Sixth Circuit equitably estopped the agency from doing so. *Id.* at *7. Similarly, in *Hondros v. United States Civil Service Commission*, 720 F.2d 278, 296 (3d Cir. 1983), federal regulations required a federal marshal to take a certification test to be promoted from a temporary to a permanent position. The Third Circuit held that the Civil Service Commission deliberately manipulated the timing of the test solely to prevent a worker from receiving the promotion and estopped the Commission from enforcing the regulation requiring the test. *See also Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 499, 501 (7th Cir. 1989) (where U.S. Attorney's Office agreed not to have certain funds escheat to the United States and later reneged, it was "a proper place to invoke an estoppel against the United States").

The Government claims that one of the cases Petitioners cited in which a court estopped the Government, *Winter v. United States*, 93 F. App'x 145 (9th Cir. 2004), is of little importance because it is "not binding precedent within the Ninth Circuit." Opp'n at 17. Even under the rule the Government cites, however, parties are permitted to rely on unpublished decisions like *Winter* "to demonstrate the existence of a conflict among opinions." 9th Cir. R. 36-3(c)(iii). *Winter* is yet another example of a federal circuit court equitably estopping the federal government based on its affirmative misconduct.

Other courts, though not entering final judgment for the plaintiff, have held that the plaintiff stated a valid estoppel claim and remanded for further factual findings. For example, in *United States v. Fitzgerald*, 938 F.2d 792, 794 (7th Cir. 1991), the Seventh Circuit held that the Small Business Administration ("SBA") could be estopped by an SBA representative's statement to guarantors on a federally backed loan that they "no longer had any obligation to the SBA on the loan guaranty." The court noted that the statement may have "risen above the level of mere negligence" and remanded to the district court to determine whether the SBA's acts qualified as affirmative misconduct. *Id.* at 797.[6]

The Federal Circuit's aberrational, absolutist holding that the federal government never can be estopped from enforcing a regulatory requirement, regardless of the extent of its deception or other misconduct, has created a definite circuit conflict on an important question of law that merits this Court's attention. That it is the Federal Circuit that is the outlier in this circuit split only exacerbates the need for *certiorari* because that court frequently is called upon to pass on the permissi-

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[6] *See also Best v. Stetson*, 691 F.2d 42, 44 (1st Cir. 1982); *In re Riverside Inv. P'ship*, 674 F.2d 634, 641 (7th Cir. 1982); *Semaan v. Mumford*, 335 F.2d 704, 706 (D.C. Cir. 1964); *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir. 1962).

bility of the Government's conduct, particularly toward federal workers.

IV. Alternatively, This Court Should Summarily Reverse and Remand Because the Federal Circuit's Appellate Fact-Finding and Refusal To Allow Petitioners To Raise New Arguments After Its Dramatic Change in the Law Contravened This Court's Precedents.

The Government maintains that reversal is unwarranted because the court of appeals engaged in appellate fact-finding only at Petitioners' invitation and that, despite all appearances to the contrary, "the court of appeals did not announce a new [legal] standard" governing this case. Opp'n at 17.

First, the Federal Circuit's refusal to allow Petitioners the opportunity to satisfy its new interpretation of § 550.111(c) on remand, and instead to make findings of fact on appeal concerning whether Petitioners' evidence satisfied the writing requirement, is flatly inconsistent with this Court's precedents. In *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), a court of appeals announced a new legal standard governing an overtime class action lawsuit and applied that standard without remanding the case. This Court reversed on this ground alone, *id.* at 714, and its holding mandates reversal here. *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995). The Government does not attempt to justify or defend this error on the merits, but instead twists the record to suggest that the Federal Circuit "reached that issue at petitioners' express invitation." Opp'n at 18. To the contrary, Petitioners never requested affirmance on this alternative ground. They merely noted—in response to the Government's argument to the Court of Federal Claims—that summary judgment could not be granted to the Government because questions of fact remained on this issue. Br. of the Pl.'s-Appellees at 34, *Doe II*.

Second, the Government's contention that the Federal Circuit did not create any new law is empirically false. In the years since *OPM v. Richmond*, 496 U.S. 414 (1990), the Court of Federal Claims consistently ruled that a federal employee must be paid under § 5542(a) for overtime work that was "officially ordered or approved," regardless of whether he received specific written authorization. *See, e.g.*, *Buckley v. United States*, 51 Fed. Cl. 174, 217 (2001); *Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993); *DeCosta v. United States*, 22 Cl. Ct. 165, 165–66 (Dec. 1990). Indeed, that court came to the same conclusion in the instant case and initially rendered judgment for Petitioners on liability. *See Doe I*, 54 Fed. Cl. at 418. Thus, the Federal Circuit's ruling in *Doe II*, which *expressly recognized* it was changing the law of the circuit, reversed over a half century of well-settled caselaw, *see* Pet. at 27 n.8, including numerous cases post-dating *Richmond* and *Schweiker*. Given this unexpected change in the governing law, this Court's precedents required the Federal Circuit to give Petitioners the opportunity to raise new, previously unnecessary claims.[7] *Cf. Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 66 (1966). Accordingly, this Court should vacate the Federal Circuit's rulings and instruct it to remand the case to the Court of Federal Claims to permit Petitioners to satisfy the new criteria and allow the trial court to make the necessary legal and factual findings.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioners respectfully request that this Court issue a writ of *certiorari*.

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[7] For example, Petitioners could have argued that DOJ should have included overtime as part of Petitioners' "regularly scheduled administrative workweeks" under 5 C.F.R. § 610.121(b)(3) (2006), which expressly creates a private right of action and does not contain a writing requirement.

Respectfully submitted,

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